# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1933

# No. 531

LEO NEBBIA, APPELLANT,

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK

INDEX


| | Original | Print |
|---|---|---|
| Record on appeal to court of appeals of New York | 1 | 1 |
| Information, city court of Rochester | 3 | 1 |
| People's Exhibit 1—Order No. 5 of Milk Control Board | 20 | 2 |
| Notice of appeal to county court | 24 | 3 |
| Judgment of affirmance, county court | 28 | 3 |
| Notice of appeal to court of appeals | 29 | 4 |
| Certificate as to question of law | 30 | 4 |
| Citation and service (omitted in printing) | 33 | |
| Order allowing appeal to U. S. Supreme Court | 35 | 5 |
| Petition for appeal to U. S. Supreme Court | 37 | 6 |
| Assignments of error | 40 | 7 |
| Bond on appeal (omitted in printing) | 42 | |
| Stipulation as to transcript of record | 45 | 9 |
| Case and exceptions | 47 | 10 |
| Arraignment and plea | 47 | 10 |
| Motion to dismiss | 47 | 10 |
| Testimony of Jedo Del Signore | 49 | 11 |
| Renewal of motion to dismiss | 49 | 12 |
| Finding of court | 50 | 12 |
| Motion in arrest of judgment | 50 | 12 |
| Judgment | 51 | 13 |
| Opinion, Pound, C. J., court of appeals | 59 | 13 |
| Dissenting opinion, O'Brien, J | 71 | 23 |
| Remittitur, court of appeals | 78 | 28 |
| Judgment on remittitur, county court | 80 | 30 |
| Clerk's certificate (omitted in printing) | 81 | |
| Judge's certificate (omitted in printing) | 81 | |
| Statement of points to be relied upon and designation of parts of record to be printed | 82 | 30 |


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[fols. a-3]

**IN CITY COURT OF ROCHESTER**

CRIMINAL BRANCH

348

THE PEOPLE
vs.
LEO NEBBIA

**Jay**

INFORMATION

STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

Luther Webster, being duly sworn, deposes and says, that he resides at No. 72 Culver Parkway in the City of Rochester, County of Monroe and State of New York: That on the 19th day of April, 1933, at the City of Rochester, in this County, one, Leo Nebbia, wrongfully and unlawfully did commit a misdemeanor, to wit, the crime of selling milk below minimum price, committed as follows: That then and there the said defendant did sell a quantity of milk, at retail, below the minimum price of nine cents per quart as fixed by the Milk Control Board in violation of Section 312, Subdivision (e) of the Agricultural and Markets Law of the State of New York.

That upon information and belief, the above named defendant sold a quantity of milk for less than 9c per quart, the price fixed by the Milk Control Board of New York State; that the source of deponent's information and ground for his belief is the attached affidavit of Jedo Del Signore [fols. 4-19] which states, in substance, that on April 19, 1933, he purchased a quantity of milk of the above named defendant, consisting of two one quart bottles of milk, also purchasing a loaf of Italian bread, for which he paid defendant 18c which affidavit deponent refers to as forming part of this information.

That deponent also refers to the attached affidavit of Martin F. May, which states in substance that the said Jedo Del Signore turned the milk and bread he had purchased from defendant over to him immediately after the purchase,

and he now has them in his possession, as forming part of this information.

Wherefore, deponent asks that a warrant may issue for the arrest of the said defendant, that he may be dealt with according to law.

Luther Webster

Taken, subscribed and sworn to before me, this 3rd day of May, 1933. Leighton Gridley, Conf. Clerk of the City Court of Rochester.

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[fol. 20] PEOPLE'S EXHIBIT 1—ORDER NO. 5

STATE OF NEW YORK, DEPARTMENT OF AGRICULTURE AND MARKETS, MILK CONTROL BOARD

Official Order No. 5

In the Matter of the Fixing of Minimum Prices of Milk in Cities and Villages of New York State Exclusive of the Metropolitan Area

Such investigations and proofs as the emergency permits having been made, and public hearing having been had after notice which, in the judgment of the Board, is sufficient,

And due deliberation having been had, it is hereby

Ordered that until further notice and subject to the exceptions hereinafter made, the following shall be the minimum prices to be charged for all milk and cream in any and all cities and villages of the State of New York, of more than One thousand (1,000) population, exclusive of New York [fol. 21] City and the Counties of Westchester, Nassau and Suffolk:

| Milk | By milk dealers to consumers | By milk dealers to stores | By stores to consumers |
|---|---|---|---|
| Quarts in bottles | 10c | 8c | 9c |
| Pints " " | 6c | 5c | 6c |
| ½ Pints " " | ... | 3c | ... |
| Bulk per quart | ... | 6c | ... |
| Cream, 40% fat | | | |
| Quarts in bottles | 62c | 45c | ... |
| Pints " " | 34c | 25c | ... |
| ½ Pints " " | 18c | 14c | 16c |
| Bulk cream per quart | ... | 41c | ... |

[fols. 22 & 23] This order shall take effect at 1:00 A. M., on Monday, April 17, 1933.

Milk Control Board. Charles H. Baldwin. Thomas Parran, Jr. Kenneth F. Fee.

Dated at Albany, N. Y., April 14, 1933.

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[fols. 24-27] In City Court of Rochester

Notice of Appeal to County Court

(Same title)

To the District Attorney of the County of Monroe, to the Clerk of the City Court of the City of Rochester, Criminal Branch, and to the County Clerk, County of Monroe, New York:

You and each of you will please take notice: that the defendant, Leo Nebbia, herein appeals to the County Court of the County of Monroe, New York, from a judgment of conviction rendered by the City Court of the City of Rochester, Criminal Branch, on the 26th day of May, 1933, whereby the defendant was sentenced to pay a fine of Five Dollars ($5.00) upon a charge of a violation of Section 312, Subdivision (E) of the Agriculture and Markets Law of the State of New York.

Dated at Rochester, N. Y., May 31, 1933.

Sutherland & Sutherland, Attorneys for the Defendant, No. 820 Union Trust Bldg., Rochester, New York.

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[fol. 28] In County Court of Monroe County

The People of the State of New York,
Plaintiff-Respondent,

against

Leo Nebbia, Defendant-Appellant

Judgment of Affirmance—June 8, 1933

The above named defendant having appealed to this Court from a Judgment of conviction rendered against him in the City Court of the City of Rochester, Criminal

Branch, on the 26th day of May, 1933, and the said appeal having been regularly moved for argument before this Court and Joseph McSweeney, Esq., attorney, appearing for the People and Arthur E. Sutherland, Jr., Esq., attorney, appearing for the defendant, and arguments of counsel having been heard and the briefs submitted having been considered and due deliberation being had thereon, it is hereby

[fol. 29] Ordered, adjudged and decreed that the judgment appealed from, be and the same hereby is affirmed.

Enter.

Wm. F. Lynn, Monroe County Judge. John H. Law, Clerk.

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In County Court of Monroe County

[Title omitted]

Notice of Appeal to Court of Appeals

To John H. Law, County Clerk of Monroe County; to Ray F. Fowler, District Attorney of Monroe County:

Sirs: Please to take notice that the defendant, Leo Nebbia, hereby appeals to the Court of Appeals of the State of New York from a judgment of the Monroe County Court [fols. 30-32] rendered June 8, 1933, affirming a judgment of City Court of the city of Rochester, Criminal Branch, on the 26th day of May, 1933, whereby the appellant was convicted and sentenced to a fine of Five Dollars ($5.00) upon a charge of a violation of Section 312, Subdivision "E" of the Agriculture and Markets Law of the State of New York.

Dated at Rochester, New York, June 7, 1933.

Sutherland & Sutherland, Attorneys for the Defendant-Appellant, 820 Union Trust Building, Rochester, New York.

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Certificate That a Question of Law Is Involved Which Ought to be Reviewed by the Court of Appeals

I, Charles B. Sears, Presiding Justice of the Appellate Division, Fourth Department, certify that a question of

law is involved herein which ought to be reviewed by the Court of Appeals.

Charles B. Sears, Presiding Justice, Appellate Division, Fourth Department.

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[fols. 33 & 34] Citation, in usual form, showing service on John J. Bennett, Jr., et al., omitted in printing.

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[fol. 35] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled suit having prayed the allowance of an appeal herein to the Supreme Court of the United States from the judgment made and entered herein by the Court of Appeals of the State of New York on the 11th day of July, 1933 and having presented and filed his petition for appeal, assignment of errors, and prayer for reversal pursuant to the statutes and the rules of the Supreme Court of United States, it is now,

Ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States as provided [fol. 36] by law and it is,

Further ordered that the Clerk of the County Court of the County of Monroe and State of New York, to which Court the record herein has been remitted shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that the transcript shall reach said Court within forty days of this date, and it is,

Further ordered that security for costs herein be fixed in the sum of Five Hundred Dollars.

Dated August 31, 1933.

Cuthbert W. Pound, Chief Judge of the Court of Appeals of the State of New York.

[fol. 37] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

The above named Leo Nebbia considering himself aggrieved by the final judgment of the Court of Appeals of the State of New York rendered July 11, 1933, in the above entitled cause affirming the judgment of the Monroe County Court rendered June 8th, 1933 which affirmed a judgment of the City Court of the City of Rochester rendered May 26, 1933, convicting this appellant of the alleged crime of selling milk in violation of a minimum price of nine cents per quart as fixed pursuant to Chapter 158 of the Laws of 1933, and being Article 25 of the Agriculture and Markets Law, Section 312 "E" and Official Order #5 of the Milk Control Board, Department of Agriculture and Markets of the State of New York in that said Leo Nebbia on April 19, 1933, at Rochester, New York, offered for sale and did sell [fol. 38] to one Jedo Del Signore two one-quart bottles of pasteurized milk and a five cent loaf of Italian bread for the total sum of eighteen cents,

Hereby prays that an appeal by this appellant be allowed to the Supreme Court of the United States herein to the end that said judgment of the Court of Appeals of the State of New York may be there reviewed and considered and justice done this appellant and that an order be made fixing the amount of the bond required of the appellant herein on such appeal.

The appellant further shows that this case is one in which the validity of the statute of the State of New York hereinbefore set forth is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the final judgment of the Court of Appeals of the State of New York, which is the highest Court of that State in which a decision in the suit could be had, has been in favor of the validity of the statute. The appellant therefore respectfully shows that this case is one in which a review may be had by appeal in the Supreme Court of the United States as a matter of right.

The opinion of the Court of Appeals is reported at 262 New York, Page 259, and the order of affirmance of the

Court of Appeals (and the remittitur) was entered in the Office of the Clerk of said Court on July 11, 1933.

[fol. 39] PRAYER FOR REVERSAL

Because of the foregoing errors, the appellant Leo Nebbia prays that the said judgment of the Court of Appeals of the State of New York dated July 11, 1933 in the above entitled cause be reviewed by the Supreme Court of the United States and reversed and judgment rendered in favor of the appellant and for costs.

Arthur E. Sutherland, Attorney for the Appellant.
Arthur E. Sutherland, Junior, of Counsel.

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[fol. 40] IN SUPREME COURT OF UNITED STATES

ASSIGNMENT OF ERRORS

The appellee above named assigns the following errors in the record and judgment of the said Court of Appeals:

The Court of Appeals erred:

1. In holding that Chapter 158 of the Laws of 1933 of the State of New York, being Article 25 of the Agriculture and Markets Laws, Section 312 "E" was not invalid because of a conflict with the Fourteenth Amendment to the Constitution of the United States.

2. In that it failed to hold that Chapter 158 of the Laws of 1933 of the State of New York, being Article 25 of the Agriculture and Markets Laws, Section 312 "E" deprived the appellee of his liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. In that it failed to hold that Chapter 158 of the Laws of 1933 of the State of New York, being Article 25 of the Agriculture and Markets Law, Section 312 "E" denied to the appellee the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. In that it failed to hold that Official Order #5 of the Milk Control Board, Department of Agriculture and Markets of the State of New York promulgated pursuant to

Chapter 158 of the Laws of 1933 of the State of New York, being Article 25 of the Agriculture and Markets Law, Section 312 "E" was not invalid because of a conflict with the Fourteenth Amendment to the Constitution of the United States.

5. In that it failed to hold that Official Order #5 of the Milk Control Board, Department of Agriculture and Mar-
[fol. 41] kets of the State of New York promulgated pursuant to Chapter 158 of the Laws of 1933 of the State of New York, being Article 25 of the Agriculture and Markets Law, Section 312 "E" deprived the appellee of his liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

6. In that it failed to hold that Official Order #5 of the Milk Control Board, Department of Agriculture and Markets of the State of New York promulgated pursuant to Chapter 158 of the Laws of 1933 of the State of New York, being Article 25 of the Agriculture and Markets Law, Section 312 "E" denied to the appellee the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

7. In that it gave judgment affirming the judgment of the County Court of Monroe County holding Chapter 158 of the Laws of 1933 of the State of New York, being Article 25 of the Agriculture and Markets Law, Section 312 "E" to be constitutional.

8. In that it gave judgment affirming the judgment of the County Court of Monroe County holding Official Order #5 of the Milk Control Board, Department of Agriculture and Markets of the State of New York promulgated pursuant to Chapter 158 of the Laws of 1933 of the State of New York, being Article 25 of the Agriculture and Markets Law, Section 312 "E" to be constitutional.

[fol. 41½] [Endorsed:] Due personal service of a copy of the within is hereby admitted this 13th day of September, 1933. John J. Bennett, Jr., Attorney-General of the State of New York. Henry Epstein, Solicitor-General of the State of New York, Henry S. Manley, General Counsel to the Milk Control Board and Counsel to the N. Y. Dept.

of Agriculture and Markets. Smith O'Brien, Attorney for Complainant.

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[fols. 42-44] Bond on appeal for $500.00 omitted in printing.

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[fol. 45] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated between appellant and appellees herein by their respective counsel, and the said counsel hereby indicate as the portions of the record to be included in the transcript herein, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, the following:

The Information (pages 3 and 4, original record).

(Supporting affidavits of May and Del Signore to be omitted.)

Case and Exceptions with narrative statement of evidence, hereto annexed.

[fol. 46] (Question and answer case and exceptions to be omitted.)

People's exhibit 1, Order No. 5.

Original record, pages 20-21, down to words, "and be it further hereby ordered,"—omit remainder of Ex. 1, down to words "This order shall take effect at 1:00 A. M. on Monday, April 17, 1933. Milk Control Board, Charles H. Baldwin, Thomas Parran Jr., Kenneth F. Fee, Dated at Albany, N. Y., April 14, 1933."

(Omit certificate authenticating order.)

Notice of Appeal to County Court.

(Omit Certificate of Judge Wilder, Stipulation Waiving Notice of Argument, and Decision of County Court.)

Judgment of Affirmance in County Court (Orig. page 28).

Notice of Appeal to Court of Appeals (Orig. page 29).

Certificate that a Question of Law is involved which ought to be reviewed by the Court of Appeals (Orig. page 30).

(Omit Stipulation and Affidavit as to opinion, and Order Settling Case.)

Prevailing and Dissenting Opinions of the Court of Appeals.

Petition for Appeal to U. S. Supreme Court, Order allowing appeal, assignment of errors, citation, statement as to jurisdiction, stipulation as to record.

It is further stipulated by Counsel for the respective parties that the following is a correct transcript of the—Case and Exceptions—with a narrative statement of the evidence herein which may be made a part of the record and filed in the Court below and certified to the Supreme Court of the United States in lieu of the statement of the evidence as it now appears in the record.

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[fol. 47] **Case and Exceptions**

(Same title)

Before Hon. Arthur L. Wilder, Judge

May 4, 1933.

ARRAIGNMENT AND PLEA

The defendant was arraigned, charged with selling milk below the minimum price of nine cents per quart fixed by the Milk Control Board, at Rochester, N. Y., April 19th, 1933.

Court: How do you plead?

Defendant: Not guilty.

Court: You are entitled to counsel. Adjournment to procure counsel. Adjourned to May 18th, 1933, and all rights reserved.

May 22nd, 1933 (Trial)

Hon. Arthur L. Wilder presiding.

Smith O'Brien, Esq., for the People.

Arthur E. Sutherland, Jr., Esq., for the defendant and defendant in person.

MOTION TO DISMISS

Mr. Sutherland: May it please the Court, I demur to the information and move at this time that the information in

this case against the defendant be now dismissed, and he be discharged, upon the ground that the information fails [fol. 48] to state a crime, for the reason that the statute and order under which the information purports to be made, is in conflict with both the Constitution of the United States and the Constitution of the State of New York and therefore the statute and order, insofar as it applies to the defendant now in this case, is of no force whatsoever and without legal effect under the particular sections of the state and federal constitutions which I am about to mention, and other sections. I should like to call to the attention of the Court in particular the Fourteenth Amendment to the federal constitution, which in substance forbids any state to deprive any person of the right to life, liberty and property without due process of law, and to the identical section of the state constitution, the language of which differs, yet is somewhat similar. As I say, I do not, in making this motion, wish to confine myself to the Fourteenth Amendment of the federal constitution or the similar provision of the state constitution, but I wish to raise the question of the validity of this statute and order under all the provisions of the state and federal constitutions.

Court: Motion denied.

Mr. Sutherland: May I have an exception?

Court: You may.

Mr. Sutherland: May I have the right to renew my motion at the close of the trial?

Court: Yes, you may.

[fol. 49] JEDO DEL SIGNORE sworn.

Examined by Mr. O'Brien:

The witness testified that on April 19, 1933, he went to the grocery store of defendant Nebbia in Rochester, New York and bought from Nebbia two one quart bottles of milk and a five cent loaf of bread for a total price of eighteen cents.

MARTIN F. MAY sworn.

Examined by Mr. O'Brien:

The testimony of witness May is omitted as merely cumulative.

Court: Adjourned to May 26th, 1933, for further testimony and for proofs.

May 26, 1933.

Hon. Arthur L. Wilder presiding.
Smith O'Brien, Esq., for the People.
Arthur E. Sutherland, Jr., Esq., for the defendant and defendant in person.

Mr. O'Brien: I offer in evidence Official Order No. 5, as being an authentic copy of the original filed and posted in Albany, N. Y.

Court: Received and marked People's Exhibit No. 1.

### Renewal of Motion to Dismiss

Mr. Sutherland: I would like at this time to renew all [fol. 50] motions made at the opening of the People's case, and in particular, to renew my motion to dismiss the information upon the ground that no facts constituting a crime are recited in the information, for the reason that the statute and order upon which the information is based are in conflict with both the Constitution of the United States and the Constitution of the State of New York. And at this time, I demur to the information and move to dismiss the information upon the grounds that the information fails to state or to charge the defendant with any facts constituting a crime, on the grounds stated in the motion made at the opening of the case and before any testimony was taken,

Court: I will deny your motion and grant you an exception.

Mr. Sutherland: Defendant rests.

### Finding of Court

Court: I find the defendant guilty as charged.

### Motion in Arrest of Judgment

Mr. Sutherland: Now I move in arrest of judgment upon the same grounds which formed the basis of my previous motion to dismiss the information and which formed the basis of my demurrer to the information, namely, that no facts sufficient to constitute a crime are stated in the information or supporting affidavits because the statute and

order upon which the information is based are in conflict with both the state and federal constitutions.

Court: Your motion is denied and I give you an except-
[fol. 51] tion.

JUDGMENT

Court: On the question of sentence, I feel in view of the fact this is a test case, and in order that there shall be no technical questions introduced into the case which might prevent or abort its consideration by the higher courts on the merits, I will impose a nominal fine, and with the assurance and warning that once it is finally determined that this law, and the orders made under it, are legal, the nominal fine in this case shall not be regarded as a precedent by future violators. Therefore, I impose a nominal fine of five dollars.

Mr. Sutherland: If Your Honor please, may it appear upon the record in this case that the defendant, Nebbia, pays his fine under protest?

Court: Let it be so noted.

[fols. 52–58] John J. Bennett, Jr., Attorney-General; Henry Epstein, Solicitor-General; Henry S. Manley, Counsel to the Department of Agriculture and Markets. Arthur E. Sutherland, Counsel for the Appellant. Smith O'Brien, Counsel for the Complainant.

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[fol. 59] IN COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

LEO NEBBIA, Appellant

Argued June 13, 1933; Decided July 11, 1933

Appeal, by permission, from a judgment of the Monroe County Court, entered June 8, 1933, affirming a judgment of the City Court of Rochester, Criminal Branch, convicting the defendant of a violation of subdivision e of section 312 of the Agriculture and Markets Law in selling milk at a price less than that fixed by the Milk Control Board.

OPINION

POUND, CH. J.:

This case comes before the Court of Appeals on appeal from a judgment of the Monroe County Court which affirmed a conviction of the defendant-appellant, Leo Nebbia, in the City Court of Rochester, Criminal Branch (Code Crim. Pro § 520). The offense charged in the information was a sale by Mr. Nebbia of two one-quart bottles of milk and a loaf of "Italian bread" for eighteen cents, which is conceded to be a violation of section 312, subdivision (e), of the Agriculture and Markets Law (Cons. Laws, ch. 69), inasmuch as the Milk Control Board had fixed a minimum price for milk at nine cents per quart.

This act (Laws of 1933, ch. 158) was adopted after a thorough legislative investigation of the conditions under which milk was produced in this State. It begins with a statement to the effect that the milk business is one affecting the public health and interest, and that an emergency exists. It provides as follows:

"§ 300. Legislative finding; statement of policy: This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk [fol. 60] products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely

destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination."

The act then (§ 301) defines the classes of persons with whose conduct it deals; principally as follows:

"Milk Dealer, means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold.

"Producer, means a person producing milk within the State of New York."

Section 302 of the act then creates a Milk Control Board of three members, the Commissioner of Agriculture and Markets, the Commissioner of Health, and the Director of the Milk Control Board. Of these, the first two may designate deputies to perform their functions. A majority of the members of the Board carries the power to decide any question before the Board.

This Board is granted great powers by the act, which ends, however (§ 319), on March 31, 1934, and is avowedly [fol. 61] a mere temporary measure to meet an existing emergency.

(§ 312) The Board must fix by order the minimum wholesale and retail prices for milk handled within the State for fluid consumption, including the prices on sales of milk dealers to consumers; this includes dealers who run stores (unless the milk is consumed on the premises). In fixing the prices it must take into consideration the amount necessary to yield a "Reasonable return" to the producer and the milk dealer.

It may similarly fix maximum prices if it sees fit. Section 304 gives rulings of the Board the force and effect of law.

(§ 308) The board has power to issue or withhold a license, as a condition of continuance in business, to or from any milk dealer in the State. Certain classes it may or may not exempt from the license requirements—such as small dealers and "carry away" stores. No unlicensed dealer (unless exempted) may sell or buy milk, or handle milk previously handled in violation of the act.

(§ 308, subd. 3) The Milk Control Board may refuse, suspend or revoke a license (thereby putting the dealer out of business) if a dealer

(a) has been receiving from a producer shipments of milk in a course of dealing and then rejects a shipment "without reasonable cause";

(b) has failed "without reasonable cause" to pay a milk bill to a producer;

(c) where the dealer has done an act "in demoralization of the price structure of pure milk";

(d) where the dealer assigns for creditors, goes through bankruptcy, or has an execution returned unsatisfied against him;

[fol. 62] (h) where the dealer fails to furnish information or keep records required by the board;

(k) where the licensee has violated any of the provisions of this article.

Section 306 gives the Board sweeping powers to examine all books and records to enable the Board to administer the act.

Besides the power given to the Board (by Section 308) to enforce the act by barring from the milk business any person who fails to comply, there is provided by section 307 an additional criminal sanction. A violation of the article, or of a rule or order of the Board lawfully made, is made a misdemeanor, punishable by not more than a year's imprisonment, or not more than one hundred dollars fine or both. The Board may also proceed civilly at law, or may enjoin, without proof that a remedy at law does not exist.

The appellant not unfairly summarizes this law by saying that it first declares that milk has been selling too cheaply in the State of New York, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote

of three officials. As an aid in enforcing the rate regulation, the milk industry in the State of New York is made a business affecting the public health and interest until March 31, 1934, and the Board can exclude from the milk business any violator of the statute or the Board's orders.

The fixing of minimum prices is one of the main features of the act. The question is whether the act, so far as it provides for fixing minimum prices for milk, is unconstitutional under New York Constitution, article 1, section 6, and United States Constitution, Fourteenth Amendment, in [fol. 63] that it interferes with the right of the milk dealer to carry on his business in such manner as suits his convenience without State interference as to the price at which he shall sell his milk. The power thus to regulate private business can be invoked only under special circumstances. It may be so invoked when the Legislature is dealing with a paramount industry upon which the prosperity of the entire State in large measure depends. It may not be invoked when we are dealing with an ordinary business, essentially private in its nature. This is the vital distinction pointed out in

New State Ice Co. v. Liebmann (285 U. S. 262, 277)

It is argued that the Supreme Court of the United States has definitely excluded the production and sale of food from the field of price regulation. This is not so. (Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 538). Even if it were true under normal conditions, the same might have been said of the regulation by law of rents. Yet when an emergency arose after the war, resulting in burdensome rental conditions, emergency rent laws, temporary in their nature, were upheld. (Block v. Hirsh, 256 U. S. 135.) The court in regard thereto held:

1. That the legislative declaration of facts affording the ground for the regulation was entitled to great respect and was confirmed by common knowledge.

2. That the exigency existing clothed the letting of buildings with a public interest so great as to justify regulation by law, while such exigency lasted.

3. That such regulation was justified as temporary measure, even though it might not be a permanent change.

4. That, the end being legitimate and the means reasonably related to it, the wisdom of the means was not for the courts to pass upon.

[fol. 64] As is conceded in the Liebmann Case (supra) all businesses are subject to some measure of public regulation. This is true in an exceptional degree of the milk business.

People v. Teuscher, 248 N. Y. 454.

The question is as to whether the business justifies the particular restriction, or whether the nature of the business is such that any competent person may, conformably to reasonable regulation, engage therein.

The production of milk is, on account of its great importance as human food, a chief industry of the State of New York. (Manley, "Constitutionality of Regulating Milk as a Public Utility," 18 Cornell Law Quarterly, 410; Cross, "Milk Control Law," N. Y. State Bar Assn. Bulletin, May, 1933; "Legislative Regulation of the New York Dairy Indutry," 42 Yale Law Journal, 1259.) It is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depend upon it. The entire milk product cannot be sold locally. It must be sold to milk gatherers to be shipped to centers of population. Distributors buy the milk from the farmer. The purchaser is compelled to take what the shipper offers. The shipper offers a low rate at which milk cannot profitably be produced. The State seeks to protect the producer by fixing a minimum price for his milk to keep open the stream of milk flowing from the farm to the city and to guard the farmer from substantial loss.

People v. Perretta, 253 N. Y. 305.

Price is regulated to protect the farmer from the exactions of purchasers against which he cannot protect himself.

These conditions called for the appointment by the Legislature on March 10, 1932, of a special joint legislative committee known as the Pitcher Committee,

[fol. 65] "* * * investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State * * *."

This committee held public hearings, took testimony and make a report. It found that price-cutting had reduced the price to the producer below two cents the quart and

below the cost of production. It said: "The production and distribution of milk in this state is a paramount industry and affects in a large measure the health and prosperity of the people of the state. It is the duty of the state to take such measures as are necessary and reasonable to preserve this vital industry.

"The financial situation of dairy farmers in the state is very serious and has grown increasingly critical during the period of the committee's investigation.

"The principal causes of the extremely low prices for milk are the unprecedented recession in business and the periodic increase in the number of dairy cows.

"The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control.

"A State Milk Control Board with broad powers is required to deal with the present emergency in the fluid milk industry of the state."

Among the causes of low milk prices mentioned in this preliminary report were the following: "Unsettled market conditions have led to price wars among distributors which have caused reductions in retail and wholesale prices below the point justified by the supply and demand situation. Unfair and destructive trade practices have been more preva- [fol. 66] lent and more serious than usual in their effect upon the price structure."

It also found: "The fact that the larger distributors find it necessary to carry large quantities of surplus milk while the smaller distributors do not, leads to price-cutting and other forms of destructive competition, especially when the surplus is abnormally large. The small distributor can contract for his minimum requirements and depend upon emergency purchases when threatened with a shortage. The larger distributors can not do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of this situation is that the smaller distributors who take no responsibility for the surplus, by purchasing their milk on the basis of the blended returns by the larger organizations, are in a position to undersell the larger distributors in the cities.

"Most of the surplus in the New York milk shed is carried by the Dairymen's League and the Sheffield Farms

Company. Other dealers by selling all or nearly all their supply as fluid milk have been able to engage very generally in price-cutting which has repeatedly forced the large retail distributors (Borden's and Sheffield Farms) to lower their prices so as to protect their business. Some means of control is urgently needed which will place all buyers of milk on an equal basis as to the cost of their milk which they purchase for sale in fluid form. Only in this way can prices be stabilized above the ruinous level of returns from butter and cheese, or the public be assured that the most efficient methods of distribution will prevail."

In one of the final conclusions of this preliminary report the committee found: "It is clear that the economic law [fol. 67] of supply and demand cannot be relied upon either to insure the consumers of a continuous and adequate supply of pure and wholesome milk, or to prevent grave injury to this important industry and its possible disintegration."

It found as a remedy that a Board should have authority "to fix the prices to be paid by dealers for milk classified according to its use with proper differentials, and the retail and wholesale prices to be charged for fluid milk and cream."

The condition has given rise to scenes of violence and disorder in the attempt to organize so-called milk strikes as a protest against the low prices paid for milk. The result was the enactment of the law now under consideration. Concededly the Legislature cannot decide the question of emergency and regulation, free from judicial review, but this court should consider only the legitimacy of the conclusions drawn from the facts found.

We are accustomed to rate regulation in cases of public utilities and other analogous cases and to the extension of such regulative power into similar fields. Rents have been regulated to prevent the exactions of greedy landlords who would contend that their property was taken from them when they were deprived of the right to do what they would with their own.

(Block v. Hirsh, supra; Brown Holding Co. v. Feldman, 256 U. S. 170.)

Compensation has been provided for workmen injured by the necessary risks of their employment although the common law cast the burden of such risks on the workman.

(Arizona Employers' Liability Cases, 250 U. S. 400.) Preference to citizens in employment of laborers on public works has been upheld.

(Heim v. McCall, 239 U. S. 175.)

Prevailing rate of wages laws for workmen on municipal [fol. 68] contracts have been upheld.

(Atkin v. Kansas, 191 U. S. 207; Austin v. City of New York, 258 N. Y. 113.)

Usury laws are of an ancient house. Tariffs for the protection of home industries are upheld. Sugar bounties have not been declared unconstitutional.

(United States v. Realty Co., 163 U. S. 427.)

The rates of grain elevators (Munn v. Illinois, 94 U. S. 113) and cotton gins may be regulated. (Frost v. Corporation Commission of Oklahoma, 278 U. S. 515.) Rate fixing in the business of insurance has been upheld. (German Alliance Ins. Co. v. Kansas, 233 U. S. 289; O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251.) The regulation of wages of railroad employees has been sustained. (Wilson v. New, 243 U. S. 332.) The business of dealing in milk has been regulated so as to protect producers who must sell their produce on credit. (People v. Perretta, supra.) Commission merchants have been required to give bonds for honest accounting to prevent evils incident to the business of dealing in farm products. (Payne v. Kansas, 248 U. S. 112.)

Doubtless distinctions may be drawn, holdings to the contrary cited and false analogies pointed out. The right of private bargaining has been upheld to defeat child labor laws (Adkins v. Children's Hospital, 261 U. S. 525); to prevent the fixing of wages in industry by an arbitration board (Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522); to invalidate a State law fixing the price of gasoline (Williams v. Standard Oil Co., 278 U. S. 235); to prohibit the regulation of the price of theatre tickets by speculators (Tyson v. Banton, 273 U. S. 418); to invalidate a law to equalize prices of milk throughout the State (Fairmont Creamery Co. v. Minnesota, 274 U. S. 1; cf. [fol. 69] Central Lumber Co. v. State of South Dakota, 226 U. S. 157), and a statute to regulate the fees of an employment agent (Ribnik v. McBride, 277 U. S. 350, 356).

All these decisions are to be read in the light of surrounding circumstances. This case, for example, may be

distinguished from the Oklahoma ice case (New State Ice Co. v. Liebmann, supra), holding that the business of manufacturing and selling ice cannot be made a public business, to which it bears a general resemblance. The New York law creates no monopoly; does not restrict production; was adopted to meet an emergency; milk is a greater family necessity than ice.

Classifications, however sharply defined, appear on closer study to be separated only by imaginary lines. Sentences in judicial opinions are misleading if taken out of their context and read as if they were the gist of the decision. Mechanical concepts of jurisprudence make easy a decision on the strength of seeming authority.

The United States Supreme Court has said that although the abuses which grow up in connection with a business may afford a reason for regulating it, this is not enough to justify the "destruction of one's right to follow a distinctly useful calling in an upright way." (Adams v. Tanner, 244 U. S. 590, 594.)

Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract (Matter of Jacobs, 98 N. Y. 98; Lochner v. New York, 198 U. S. 45); with the natrural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the [fol. 70] great public needs; that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice; to conform the law to the accepted standards of the community, to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view (Austin v. City of New York, supra, p. 117); and that mere novelty is no objection to legislation (People ex rel. Durham Realty Corp. v. LaFetra, 230 N. Y. 429).

The State courts should uphold State regulation whenever possible. They should be clearly convinced that a statute is unconstitutional before they declare it invalid, (Cf. Ives v. South Buffalo Ry. Co., 201 N. Y. 271, with Arizona Employers' Liability Cases, supra; also cf. People ex rel. Rodgers v. Coler, 166 N. Y. 1, with Atkin v. Kansas, supra.)

With full respect for the Constitution as an efficient frame of government in peace and war, under normal conditions or in emergencies; with cheerful submission to the rule of the Supreme Court that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation only, and that legislative conclusions based on findings of fact are subject to judicial review, we do not feel compelled to hold that the "due process" clause of the Constitution has left milk producers unprotected from oppression and to place the stamp of invalidity on the measure before us.

With the wisdom of the legislation we have naught to do. It may be vain to hope by laws to oppose the general course [fol. 71] of trade. The English Parliament, unhampered by the limitations of a written constitution, adopted statutes which directly fixed, or empowered certain persons to fix, the prices of wine and coal. (6 Holdsworthy's History of English Law, p. 346.) Yet it is said that "The growth of the capitalistic organization of all branches of industry will strengthen the tendency to allow prices to be determined simply by the relation of supply to demand." (Holdsworth, supra.)

We are unable to say that the Legislature is lacking in power, not only to regulate and encourage the production of milk, but also, when conditions require, to regulate the prices to be paid for it, so that a fair return may be obtained by the producer and a vital industry preserved from destruction. (Hamilton, "Affectation with Public Interest," 39 Yale Law Journal, 1089-1101.) The policy of non-interference with individual freedom must at times give way to the policy of compulsion for the general welfare.

The judgment should be affirmed.

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IN COURT OF APPEALS OF NEW YORK

DISSENTING OPINION

O'BRIEN, J. (dissenting):

Pursuant to the provisions of section 312, subdivision (b) of the Agriculture and Markets Law (Law of 1933, chap. 158) the Milk Control Board established under this

statute, by order fixed the minimum price to be charged for milk by stores to consumers at nine cents a quart in bottles. By subdivision (e) of this section, sale at less than the minimum price so fixed is declared to be unlawful and no method or device, by combining the price of milk with another commodity, whereby milk is sold at a price less than the price fixed by the Board, shall be lawful.

Defendant, a retail grocer in Rochester, sold to a con- [fol. 72] sumer for eighteen cents two bottles of milk and a loaf of bread. This device whereby the milk was sold at less than nine cents a quart constitutes a plain violation of the statute and the Board's order. No problem, except the validity of that part of the statute authorizing price-fixing and the order issued in pursuance thereof is before us.

Disregarding for the moment this legislation as founded upon an assumed emergency as that term is recognized by this court and the Supreme Court of the United States, and viewing it merely as if it were an enactment adopted during a time of normal prosperity, its conflict with section 6 of article 1 of the New York Constitution and with the Fourteenth Amendment of the Federal Constitution is scarcely open to doubt. Of course the production, distribution and exchange and exchange of milk, in so far as public health may be protected and fraud prevented, are subject to the operation of the police power (Polinsky v. People, 73 N. Y. 65; Fischer v. St. Louis, 194 U. S. 361; People ex. rel. Lieberman v. Van De Carr, 199 U. S. 552; Bellows v. Raynor, 207 N. Y. 389; People v. Beakes Dairy Co., 222 N. Y. 416, 427; People v. Perretta, 253 N. Y. 305), but legislative authority in respect to sanitary regulation as an exertion of the police power may be and is "quite distinct from the power to fix prices." (Tyson & Br. v. Banton, 273 U. S. 418, 430.) A Minnesota statute similar in its nature to the one before us and branding as a crime the purchase for manufacture or sale of milk, cream or butter fat at a higher price in one locality than the price paid in another has been held to infringe the liberty of contract guaranteed by the Fourteenth Amendment. (Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 7.) In that case the opinion of the State court declared that dairying was perhaps the largest productive industry in Minnesota and held that the police power extended not only to public

health and morals but also to guarding the welfare of a [fol. 73] great industry. The Supreme Court, however conceding that the real evil at which the statute was aimed was the payment of excessive prices by powerful buyers for the purpose of destroying competition and that the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction, reversed the State court and decided that such legislation was a clear infringement of private rights. Although milk production is a very important industry, the business of the grocer, "the dairyman," the butcher, the baker, the shoemaker and the tailor, as stated by the Supreme Court in New State Ice Co. v. Liebmann (285 U. S. 262, 277) bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. Conceding that in New York as well as in Minnesota dairying is a business in which the prosperity of the entire State in large measure is involved, nevertheless it is a private business and the Supreme Court has decided that the production or sale of food cannot be subjected to legislative regulation on the basis of a public use. (New State Ice Case, supra; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522.) These decisions are founded upon interpretations of State statutes in times of peace and of course do not profess to construe the war power of Congress. Natural monopolies by which exorbitant charges might be inflicted upon the public and which without governmental regulation, would be subject to arbitrary control by their owners are undoubtedly affected by a public use. However, neither in New York nor elsewhere can the milk business be so classified. The reasons for the enactment of this statute are not that charges are too high or that a monopoly exists but that they are too low and competition is too keen. The purpose is not to reduce the price but to raise it. This policy constitutes an inversion of all recognized methods [fol. 74] of constitutional regulation of private business. Such a business may not be converted into public business by legislative fiat. (Producers Transp. Co. v. Railroad Comm., 251 U. S. 228, 230; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 442.)

The points tendered in support of the validity of this enactment emphasize its transient duration and the legislative declaration of the existence of an emergency. Section

300 recites that the law is enacted in the exercise of the police power of the State and that its purposes generally are to protect the public health and public welfare. This legislative declaration is entitled to great respect but it is not conclusive on the courts. (Block v. Hirsch, 256 U. S. 135, 154.) "Happily for all, the fundamental guaranties of the Constitution can not be freely submerged if and whenever some ostensible justification is advanced and the police power invoked." (Adams v. Tanner, 244 U. S. 590, 594, 595.) In so far as any parts of this statute may fairly tend to promote public health, they should and will be sustained, but the mere recitation to the effect that uneconomic trade practices as conducted at the time of the passage of the act imperil the supply of pure milk and constitute a means to health and that the danger is immediate and impending does not justify price-fixing. Because the statute rehearses that the present acute economic emergency has broken down the orderly production and marketing of milk, courts are not foreclosed from drawing on common knowledge and common experience. The markets are and, prior to the passage of this act, were flooded with a plethora of wholesome milk. In People ex rel. Durham Realty Corp. v. LaFetra (supra) the existence of danger to public health, safety and morals was within the knowledge of every one. The legislative declaration narrated notorious facts. When the rent legislation was enacted, the housing emergency [fol. 75] created by the absence of construction was so acute and the extortion and oppression by landlords taking advantage of a dense population's necessities were so brutal that more than one hundred thousand dispossess proceedings which affected nearly a half million human beings in the city of New York were then pending. Profiteering and oppression has become general. Public safety was imperiled by probable riots growing out of resistance to evictions, public health was endangered both by exposure to the elements and by congestion in crowded tenements by those who would be forced from more spacious habitations. Thus was presented, as truly described by Judge Pound in his opinion in that case, "a problem of the utmost gravity, calamitous in its possibilities" (p. 438). Inadequacy of housing facilities in cities had become a matter of world wide concern and of world wide knowledge.

In relation to the dairy industry, common knowledge compels the courts to conclude that, instead of imminent

danger of impairment of public health, safety or morals, the real emergency is a commercial one arising in part from those factors which have contributed to the widespread business depression from which few if any of our inhabitants have been immune. To correct these conditions, resort to the drastic remedy of fining or imprisoning small retail storekeepers who insist upon their property right to contract for the sale of milk at a price satisfactory to themselves and their customers is not a valid exercise of the police power. To bargain for the exchange of goods is no less a property right than the lawful power to contract for the rendition of services (Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N. Y. 260), and is protected by the Fourteenth Amendment. (Fairmont Creamery Co. v. Minnesota, supra.) If in fact the public health were endangered, a more rigid inspection of dairies and the revocation of licenses of those who failed to supply milk [fol. 76] of the required standard of purity would constitute the obvious remedy. The special privilege conferred by this statute upon members of a particular class by increasing the price of their product at the expense of laborers, mechanics and all other members of society cannot be regarded as such a necessary or even fairly reasonable substitute remedy as to lie within legislative discretion and to warrant its sanction by the courts. The financial condition of the dairy farmer is and has been most distressing. The same is true respecting artisans, professional men and women, traders, laborers and members of every calling and occupation. Yet every one is aware that those who can afford to buy milk obtain a wholesome quality.

The police power, although "a dynamic agency, vague and undefined in its scope" (People ex rel. Durham Realty Corp. v. LaFetra, supra, p. 442), cannot rise superior to the Constitution. This great instrument of government is not a thing merely to be extolled in academic halls, to be the subject of juvenile orations and to be tolerated as innocuous only so long as its prohibitions are unnecessary in practical ways. It is not quiescent, it is vibrant. It cannot become obsolete until the States vote to amend or repeal it. It was designed to safeguard not only life and liberty but also property rights in times of stress and suffering when despairing and desperate majorities in good

faith seek by forbidden methods to correct temporary evils which, serious and distressing as they are, will prove less harmful and enduring than would the subversion of our fundamental principles of government. If the effort manifested by this statute to regulate private contract by fixation of prices on a product which does not constitute a public use by sustained, then the police power is not only [fol. 77] undefined but it is boundless. Its operation will extend to every trade and every occupation. Each citizen will become enmeshed in an inextricable tangle of bureaucracies such as are now so prevalent in foreign countries but utterly alien to our institutions. Liberty will cease to exist. Since the warning was sounded in Matter of Jacobs (98 N. Y. 98, 114, 115), the Constitution, which of course was never intended as a document of perfect rigidity, has yielded to reasonably flexible and prudent interpretations by conservatively progressive judges, but the time has not yet come when the courts of this State ought to surrender to the doctrine that governmental prefects, in times of peace and plenty, may supervise the rearing of cattle or the price of milk. Until the people, in whom reside all political power, decide to amend their constitutions, the provisions of section 6 of article I of the New York Constitution and the Fourteenth Amendment of the Federal Constitution prevent, as valid, the recognition of the price-fixing element of this statute.

The judgment of conviction should be reversed and the information dismissed.

Crane, Lehman, Hubbs and Crouch, JJ., concur with Pound, Ch. J.; O'Brien, J., dissents in opinion; Kellogg, J., not sitting.

Judgment affirmed.

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[fol. 78] In Court of Appeals of New York

The People, &c., Respondent,

ag'st

Leo Nebbia, Appellant

Remittitur—July 11, 1933

Be it remembered that on the 9th day of June in the year of our Lord one thousand nine hundred and thirty-

three, Leo Nebbia, the appellant in this cause, came here unto the Court of Appeals, by Sutherland & Sutherland, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the County Court, Monroe County, affirming the judgment of the City Court of Rochester. And The People, &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Ray F. Fowler, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Arthur E. Sutherland, Jr., of counsel for the appellant, and by Mr. Henry S. Manley, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the [fol. 79] County Court, Monroe County, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Monroe County, before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court before the Judge thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany

July 11, 1933.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

[fol. 80] In County Court of Monroe County

Present: Hon. William F. Lynn, County Judge, presiding.

The People of the State of New York

against

Leo Nebbia, Defendant

Judgment of Affirmance—Filed Aug. 10, 1933

The above named defendant having appealed to the Court of Appeals from the judgment of this Court heretofore and on the 8th day of June, 1933, entered in the above entitled action, and the Court of Appeals having heard said appeal and having ordered and adjudged that the said judgment so appealed from be in all things affirmed,

Now, therefore, upon the remittitur from the said Court of Appeals and upon motion of Joseph McSweeney, Esq., attorney it is hereby ordered, adjudged, and decreed that the said judgment of the Court of Appeals be and the same is hereby made the judgment of this Court and that the judgment of this Court heretofore entered on the 8th day of June, 1933 be and the same is in all things affirmed.

John H. Law, Clerk.

Enter:

Wm. F. Lynn, M. C. J.

[File endorsement omitted.]

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[fol. 81] Clerk's certificate to foregoing transcript omitted in printing.

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Judge's certificate to clerk omitted in printing.

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[fol. 82] Supreme Court of the United States

Statement under Rule 13-9—Filed Oct. 14, 1933

The appellant hereby states that the points upon which he intends to rely herein are the same as the eight items listed in the Assignment of Errors. (Original record, pages 40-41).

The appellant further states that he considers that the parts of the record which he thinks necessary for the consideration thereof are all the same parts listed in the

Stipulation as to Record, (Original record, pages 45, 46) and therein indicated as the portions of the record to be included in the transcript herein.

Arthur E. Sutherland, Counsel for the Appellant, # 820 Union Trust Building, Rochester, New York.

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[fol. 83] SUPREME COURT OF THE UNITED STATES

STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

Arthur E. Sutherland, Jun'r, being duly sworn, deposes and says:

I am over the age of twenty-one years. On this 12th day of October, 1933, I served the annexed Statement under Rule 13-9, and the annexed Order for Appearance upon Henry S. Manley, Counsel for the Appellees herein, and upon Hon. John J. Bennett, Jr., Attorney-General of the State of New York, by depositing in the United States Post Office a copy of each of said papers enclosed in a sealed and postpaid wrapper, addressed respectively to the said Henry S. Manley and the Hon. John J. Bennett, Jr. at their office addresses hitherto designated at Albany, New York.

Deponent further states that he caused the said sealed and postpaid wrappers so addressed to be sent by registered mail and that in the usual course of delivery these [fols. 84 & 85] papers will be delivered to the said addressees October 13, 1933.

Arthur E. Sutherland, Jun'r.

Sworn to before me this 12th day of October, 1933.
Olive Tomlinson, Com'r of Deeds.

[fol. 86] [File endorsement omitted.]

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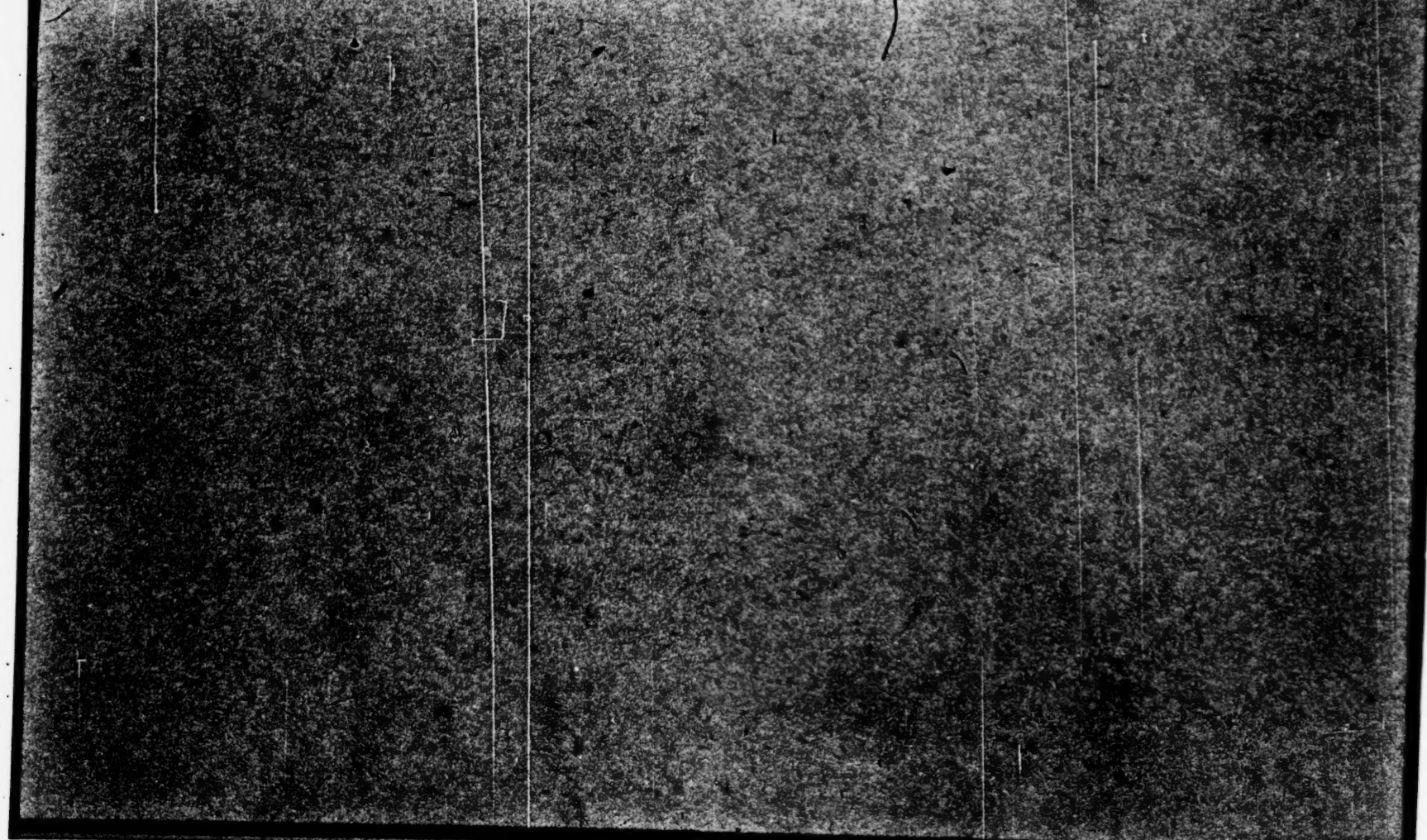
Endorsed on cover: File No. 38,134. New York, County Court, County of Monroe. Term No. 531. Leo Nebbia, appellant, vs. The People of the State of New York. Filed October 12, 1933. File No. 531, O. T., 1933.



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OCT 12 1933
CHARLES ELMORE CROPLEY

# Supreme Court of the United States

**October Term, 1933**

**No. 531**

LEO NEBBIA,
*Appellant,*
*against*
THE PEOPLE OF THE STATE OF NEW YORK,
*Appellees.*

## STATEMENT AS TO JURISDICTION AND MOTION FOR LEAVE TO FILE

ARTHUR E. SUTHERLAND,
*Counsel for the Appellant,*
Rochester, N. Y.

JOHN J. BENNETT, JR.,
*Attorney-General of the State of New York,*
Albany, N. Y.

HENRY EPSTEIN,
*Solicitor-General,*
Albany, N. Y.

HENRY S. MANLEY,
*Counsel to the Department of Agriculture and Markets,*
Albany, N. Y.

SMITH O'BRIEN,
*Counsel for the Complainant,*
Rochester, N. Y.

# Supreme Court of the United States

**October Term—1933**

**No.....**

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LEO NEBBIA,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

*Appellees.*

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## MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION

MAY IT PLEASE THE COURT:

The undersigned as counsel for appellant, Leo Nebbia, respectfully moves this Honorable Court that the annexed Statement as to Jurisdiction may be received and filed herein and considered by the Court as though annexed to the original petition for leave to appeal.

ARTHUR E. SUTHERLAND,
*Counsel for Appellant, Leo Nebbia.*

Service of the foregoing is admitted this 30th day of September, 1933.

JOHN J. BENNETT, JR.,
*Attorney-General.*

HENRY EPSTEIN,
*Solicitor-General.*

HENRY S. MANLEY,
*Counsel to the Department of Agriculture and Markets.*

ARTHUR E. SUTHERLAND,
*Counsel for the Appellant.*

SMITH O'BRIEN,
*Counsel for the Complainant.*

## STATEMENT AS TO JURISDICTION ON APPEAL

The appellant in support of the jurisdiction of this Court to review the above entitled cause respectfully shows:

### A

### Statutory Provisions Believed to Sustain the Jurisdiction.

The Act of February 13, 1925, Ch. 229, § 1, 43 Stat. 937, Judicial Code, §237 as amended, provides in part:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Act of January 31, 1928, Ch. 14, § 1; 45 Stat. 54 substituted appeals for writs of error; and by §2 of that Act as amended April 26, 1928, Ch. 440; 45 Stat. 466, the provisions of law regulating writs of error were made to apply to appeals.

### B

### The Statute of the State of New York, the Validity of Which Is Involved.

There is here involved the validity of Article 25, Agriculture and Markets Law of New York, §§300-319; being Chapter 158 of the Laws of 1933; sometimes called the Milk Control Law.

The Statute is long and complex, but its pertinent provisions may be briefly summarized.

A Milk Control Board of three members is created (§302). This Board must fix by order the minimum wholesale and

retail prices of milk handled in New York for fluid consumption (§312). The rules of the Board are to have the force of law (§304). A sale in violation is punishable by a year's imprisonment, a hundred dollars' fine, or both (§307). The Act is recited to be passed to aid in an emergency (§300) and will expire by its terms on March 31, 1934.

## C

### The Date of the Judgment Below, and the Date of Presentation of the Application for Appeal.

The New York Court of Appeals gave the judgment appealed from on July 11, 1933. (Original Record, page 78.) The application for appeal was presented to the Chief Judge of the Court of Appeals on August 31, 1933, and the order allowing appeal on that day by him granted. (Original Record, page 35.)

## D

### Nature of the Case and Ruling Below.

This case originated with an Information in City Court, Rochester, New York, charging the appellant Nebbia with a violation of the Milk Control Law of New York (§312-E, Agriculture and Markets Law of New York; Ch. 158 N. Y. Laws 1933) in that Nebbia sold milk for less than nine cents per quart, the minimum price fixed by order of the Milk Control Board. (Original Record, page 3.) Nebbia duly raised the question of the invalidity of the statute and order as being in conflict with the Fourteenth Amendment to the Federal Constitution, and was overruled by the City Court, convicted, and fined. (Original Record, page 51.) He then appealed to Monroe County Court, where his conviction was affirmed. He then appealed to the New York Court of Appeals, where his conviction was again affirmed,

with a prevailing opinion by Chief Judge Pound, and a dissenting opinion by Judge O'Brien (Original Record, pages 59-77). The Court of Appeals is the highest court of the State of New York in which a decision herein could be had. In each court the defendant Nebbia urged the invalidity of the Statute and the Order of the Milk Control Board thereunder as in conflict with the Fourteenth Amendment of the United States Constitution; and in each this contention was overruled.

E

**Case Sustaining Jurisdiction.**

*Fairmont Creamery Company v. State of Minnesota* (1926), 274 U. S. 1; 71 L. Ed. 893.

It is respectfully submitted that this court has jurisdiction herein by virtue of §237, Judicial Code.

ARTHUR E. SUTHERLAND,
*Counsel for Appellant.*

*To:*

THE PEOPLE OF THE STATE OF NEW YORK,
JOHN J. BENNETT, JR.,
*Attorney-General of the State of New York,*

HENRY S. EPSTEIN,
*Solicitor-General;*

SMITH O'BRIEN,
*Attorney for Complainant,*

HENRY S. MANLEY,
*Counsel to Milk Control Board.*

PLEASE TAKE NOTICE of the provisions of Rule 12-3 of the Rules of the Supreme Court of the United States permitting

the Appellees within fifteen (15) days after service hereof to file with the Clerk of the Court possessed of the record, and serve upon the appellant a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in or filed with such opposing statement a motion by appellees to dismiss or affirm.

ARTHUR E. SUTHERLAND,
*Counsel for Appellant.*

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# Supreme Court of the United States

October Term, 1933

No. 531

LEO NEBBIA,

*Appellant,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Appellees.*

(On appeal from the Court of Appeals of the State of New York.)

## JOINT MOTION TO ADVANCE

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*of Agriculture and Markets and*
*the Milk Control Board,*
Albany, New York.

# Supreme Court of the United States

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**No.....**

LEO NEBBIA,

*Appellant,*

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THE PEOPLE OF THE STATE OF NEW YORK,

*Appellees.*

(On appeal from the Court of Appeals of the State of New York.)

## JOINT MOTION TO ADVANCE

Now come the respective parties to this appeal and jointly move this Honorable Court that this cause be transferred for hearing to the summary docket for the following reasons:

1. This matter comes before this Court on an appeal to review the determination of the Court of Appeals in the State of New York holding that Chapter 158 of the New York Laws of 1933, sometimes called the Milk Control Law, is constitutional in so far as it authorizes the fixing of a minimum price at which milk can be sold at retail. The highest court of the State of New York has affirmed the conviction of the appellant for selling milk at a lower price than the minimum price so fixed, and the question presented is whether there is constitutional objection to that conviction.

2. Statement as to jurisdiction was served by the appellant on September 30, 1933, and has been filed. No state-

ment opposing jurisdiction will be filed, and all parties believe that this appeal is within the jurisdiction of this Court.

3. The New York statute in question will expire by its terms on March 31, 1934, but it is probable that the Legislature which convenes soon after January first and ordinarily continues until some time in April will find it necessary either to continue this or to enact some other legislation to accomplish similar purposes. It is desirable that such legislation be drafted in the light of an authoritative decision as to the constitutional principles involved.

4. The States of New Jersey, Connecticut, Florida, Ohio Vermont and Wisconsin all have similar laws enacted within the present year for relief of the dairy industry. Other states are considering the enactment of such legislation. The interests of a vast number of people are affected and will be affected by these statutes and the orders made under them.

5. It is desirable that the constitutional questions involved be determined as promptly as is consistent with thorough presentation and deliberation. All the parties to this appeal respectfully request that this Honorable Court place this cause upon the summary docket for hearing on a day certain, preferably set about four weeks in advance.

Respectfully submitted,

ARTHUR E. SUTHERLAND,
*Counsel for the Appellant.*

JOHN J. BENNETT, JR.,
*Attorney-General of the State of New York.*

HENRY S. MANLEY,
*Counsel to the Department of Agriculture and Markets and the Milk Control Board.*

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# Supreme Court of the United States

**OCTOBER TERM, 1933**

**No. 531**

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LEO NEBBIA, APPELLANT,

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK

---

## BRIEF FOR APPELLANT

---

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## Index to Subject Matter of This Brief


| | Page |
|---|---|
| Reference to official report of opinion below | 1 |
| Concise statement of jurisdictional grounds | 1 |
| Concise statement of the case | 2 |
| Summary of the Milk Control Act | 3 |
| Summary of Order No. 5 of the Milk Control Board | 6 |
| Specification of the Assigned Errors to be urged | 8 |
| Summary of the Appellant's argument | 8 |
| Point I—Statutes similar to that here in question have repeatedly been held to be violative of the Fourteenth Amendment in attempting to fix prices for common commodities or services | 10 |
| Point II—The Milk Control Law, as applied by Order No. 5 of the Milk Control Board, discriminates unfairly against Nebbia as a cash and carry dealer in milk | 18 |
| Footnote analyzing certain findings of the "Report of the Joint Legislative Committee to Investigate the Milk Industry" | 19 |
| Point III—The economic depression now affecting the dairy farmers of New York does not suspend the operation of the Fourteenth Amendment | 22 |

## Table of Cases Alphabetically Arranged


| | Cited Pages |
|---|---|
| *Adkins v. Children's Hospital* (1923), 261 U. S. 525; 67 L. Ed. 785 | 8, 15, 16 |
| *Block v. Hirsch* (1921), 256 U. S. 135; 65 L. Ed. 865 | 9, 24, 26 |
| *Brown Holding Co. v. Feldman* (1921), 256 U. S. 170; 65 L. Ed. 877 | 9, 24, 26 |
| *Court of Industrial Relations v. Wolff Packing Company* (1922), 111 Kansas, 501, 509 | 26 |
| *Fairmont Creamery Co. v. Minnesota* (1927), 274 U. S. 1; 71 L. Ed. 893 | 2, 8, 17 |
| *International Harvester Co. v. Kentucky* (1914), 234 U. S. 216; 58 L. Ed. 1284 | 22 |
| *Milligan, Ex Parte* (1866), 71 U. S. (4 Wall.) 2, 120; 18 L. Ed. 281, 295 | 9, 23 |
| *New State Ice Co. v. Liebmann* (1932), 285 U. S. 262; 76 L. Ed. 747 | 9, 14 |
| *People v. Nebbia* (1933), 262 N. Y. 259, R 13 | 1, 19 |
| *Ribnik v. McBride* (1928), 277 U. S. 350; 72 L. Ed. 913. | 17 |
| *Sterling v. Constantin* (1932), 287 U. S. 378; 77 L. Ed. 254 | 9, 24 |
| *Tyson v. Banton* (1926), 273 U. S. 418; 71 L. Ed. 718. | 8, 17 |
| *United States v. Cohen Grocery Co.* (1921), 255 U. S. 81; 65 L. Ed. 516 | 9, 24 |
| *Williams v. Standard Oil Co.* (1929), 278 U. S. 235; 73 L. Ed. 287 | 8, 10, 11 |
| *Wilson v. New* (1917), 243 U. S. 332; 61 L. Ed. 755. | 24, 26 |
| *Wolff Packing Company v. Court of Ind. Rel.* (1923), 262 U. S. 522; 67 L. Ed. 1103 | 8, 10, 17, 25, 27 |

## Table of Statutes


| | Cited pages |
|---|---|
| *Agriculture and Markets Law of New York,* Art. 25, §§ 300-319 (Milk Control Law); N. Y. Laws, 1933, Ch. 158; this brief, Appendix, page 29 ..... 2, 3, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, 18, | 22 |
| *Judicial Code,* § 237; Act. Feb. 13, 1925, Ch. 229, § 1; 43 Stat. 937, as amended; Act Jan. 31, 1928, Ch. 14, § 1; 45 Stat. 54; Act April 26, 1928, Ch. 440, 45 Stat. 466 ..... | 1 |
| *Kansas Industrial Relations Act,* Ch. 29, Laws of Kansas, Special Session 1920, page 35 ..... | 35 |
| *Minimum Wage Law, District of Columbia,* Act Sept. 19, 1918; 40 Stat. at L. 960, Ch. 174 ..... | 15 |
| *New York Civil Practice Act,* § 1011 A (Emergency Rent Law) ..... | 13 |
| *Public Acts of Tennessee* (1927), Ch. 22, page 53 ..... | 10 |
| *Report of Joint Legislative Committee to Investigate Milk Industry,* April 10, 1933; 1933 N. Y. Legislative Document No. 114—Referred to and analyzed page ..... 19 et seq. | |

# Supreme Court of the United States

**OCTOBER TERM, 1933**

**No. 531**

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LEO NEBBIA, APPELLANT,

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK

---

## BRIEF FOR APPELLANT

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## REFERENCE TO OFFICIAL REPORT OF OPINION BELOW

No opinion was written or reported below except the prevailing and dissenting opinions of the Court of Appeals of New York, reported 262 N. Y. 259, as

*The People of the State of New York, Respondent, vs. Leo Nebbia, Appellant.*

## CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

This is an appeal as of right under § 237, Judicial Code,[1] from a judgment of the Court of Appeals of the State of New York, dated July 11, 1933. The judgment affirmed the conviction of the appellant in a lower court of New York for

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[1] Act Feb. 13, 1925, Ch. 229, § 1, 43 Stat. 937, as amended; Act of January 31, 1928, Ch. 14, § 1; 45 Stat. 54; Act of April 26, 1928, Ch. 440; 45 Stat. 466.

a violation of a New York statute, called the Milk Control Law.[1]

This statute purports to fix, through Orders of a Milk Control Board, the minimum retail price of milk sold in New York. The appellant has contended in all courts that the statute, and the order of the Milk Control Board (R 2) under which he was convicted, conflict with the 14th Amendment to the United State Constitution. (R 10, 11, 12, 17). The petition for appeal (R 6) was presented to the Chief Judge of the New York Court of Appeals on August 31, 1933.

The jurisdiction here asserted was recognized by this Court in

*Fairmont Creamery Co. v. State of Minnesota* (1927), 274 U. S. 1; 71 L. Ed. 893.

Probable jurisdiction was noted herein by this Court October 23, 1933.

## CONCISE STATEMENT OF THE CASE

This case originated with an Information in City Court, Rochester, N. Y. (R 1) charging that Leo Nebbia, the appellant, sold to one Jedo-Del Signore on April 19, 1933, two quarts of milk and a loaf of bread for 18c, in violation of §312 (E) of the Agriculture and Markets Law of the State of New York, inasmuch as the Milk Control Board had fixed the minimum retail price of milk at nine cents per quart.

Nebbia was arraigned, pleaded not guilty (R 10), was tried, convicted on May 26, 1933, and fined. At the opening

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[1] Article 25, Agriculture and Markets Law of New York, §§ 300-319; Ch. 158 Laws of 1933; see the Statute reprinted in full in the Appendix, page 29 of this brief.

of the trial his counsel demurred to the information, and moved that the information be dismissed, urging, among other grounds, that the statute and order under which the information was brought were invalid under the Fourteenth Amendment to the Federal Constitution. At the close of the trial, defendant renewed these motions and his demurrer (R 12); and after conviction he moved in arrest of judgment on the same grounds (R 12). All these motions, and the demurrers, were denied and overruled with exceptions to defendant. Nebbia paid his $5.00 fine under protest.

By appropriate steps the defendant appealed to the Monroe County Court, where on June 8, 1933, his conviction was affirmed (R 3). Thereupon he appealed to the Court of Appeals (R 4) upon a certificate of the Presiding Justice, Appellate Division, Fourth Department, that a question of law was involved which ought to be reviewed by the Court of Appeals. The Court of Appeals on July 11, 1933, gave judgment affirming the judgment of the County Court (R 28). The prevailing opinion of the Court of Appeals was delivered by Chief Judge Pound (R 13) and Associate Judge O'Brien delivered a dissenting opinion (R 23).

### A Summary of the Milk Control Act

The Statute under which the conviction was had is long and complex. It is set forth in full at page 29 of this brief. A condensed analysis of its provisions may prove useful here.

The Act[1] begins with an elaborate statement (§ 300, this brief, page 30) to the effect that unhealthful and uneconomic trade practices obtain in the milk business in New

[1] Chapter 158, New York Laws of 1933, Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29.

York, whereby the constant supply of pure milk to the people is imperiled, and "in order to preserve the strength and vigor of the race" the milk business is declared to be one affecting the public health and interest. The section goes on to refer to "the present acute economic emergency" which it ascribes in part to a disparity in price between milk and other commodities, and concludes that public supervision and control are immediately necessary. Much of the phraseology of this preamble is borrowed from opinions of the United States Supreme Court in cases construing the Fourteenth Amendment, with the obvious effort to avoid its effect in this case.

The Act then (§ 301, this brief, page 31) defines the classes of persons with whose conduct it deals; principally as follows:

> "'Milk dealer' means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold.
>
> 'Producer' means a person producing milk within the State of New York."

§ 302, (this brief, page 32), of the Act then creates a Milk Control Board of three members,—the Commissioner of Agriculture and Markets, the Commissioner of Health, and the Director of the Milk Control Board. Of these, the first two may designate deputies to perform their functions. A majority of the members of the Board carries the power to decide any question before the Board.

This Board is granted most extraordinary powers by the Act.

> (§ 312, this brief, page 41). It *must* fix by order the minimum wholesale and retail prices for milk handled within the state for fluid consumption, in-

cluding the prices on sales by milk dealers to consumers: this includes dealers who run stores (unless the milk is consumed on the premises). In fixing the prices it must take into consideration the amount necessary to yield a "reasonable return" to the producer and the milk dealer.

It may similarly fix maximum prices if it sees fit. § 304 gives rulings of the Board the force and effect of law.

(§ 308, this brief, page 36). The Board has power to issue or withhold a license, as a condition of continuance in business, to or from any milk dealer in the state. Certain classes it may or may not exempt from the license requirements,—such as small dealers and "carry away" stores. No unlicensed dealer (unless exempted) may sell or buy milk, or handle milk previously handled in violation of the Act.

(§ 308-3, this brief, page 37). The Milk Control Board may refuse, suspend or revoke a license (thereby putting the dealer out of business) if a dealer

(a) has been receiving from a producer shipments of milk in a course of dealing and then rejects a shipment "without reasonable cause".

(b) has failed "without reasonable cause" to pay a milk bill to a producer.

(c) where the dealer has done an act "in demoralization of the price structure of pure milk".

(d) where the dealer assigns for creditors, goes through bankruptcy, or has an execution returned unsatisfied against him.

(h) where the dealer fails to furnish information or keep records required by the board.

(k) where the licensee has violated any of the provisions of this article.

(§ 306, this brief, page 35), gives the Board sweeping powers to examine all books and records to enable the Board to administer the Act.

Beside the power given to the Board (by § 308, this brief, page 36) to enforce the Act by barring from the milk business any person who fails to comply, there is provided by § 307 an additional criminal

sanction. A violation of the article, or of a rule or order of the Board lawfully made, is made a misdemeanor, punishable by a year's imprisonment, one hundred dollars fine, or both. The Board may also proceed civilly at law, or may enjoin, without proof that a remedy at law does not exist (§ 307; page 35 herein).

The appellant considers it no unjust summary of this law to say that it first declares that milk has been selling too cheaply in the State of New York, and has thus created a serious situation; this situation is remedied by making the sale of milk at a low price a crime, punishable by a fine and a year's imprisonment; and the question of what is a low price is determined by the majority vote of three officials. As an aid in enforcing the rate regulation, the milk industry in the State of New York is made a public utility until March 31, 1934, and the Board can exclude from the milk business any violator of the statute or the Board's orders.

The fixing of minimum prices is the main feature of the Act; its other provisions are ancillary to that master purpose.

**A Summary of Order No. 5, of the Milk Control Board**

The Milk Control Board created by the Statute, on April 14, 1933, made the Order (R 2) fixing prices, which the appellant was charged below with disregarding. The order purported to set minimum prices for sales of milk and cream in all cities and villages of more than 1000 population, except for New York City and three neighboring counties.

A noteworthy feature of this order is the classification of prices. A "dealer" (defined by § 301, page 31, this brief, as "any person who purchases or handles milk within the state, for sale in this state, or sells milk within the

state except when consumed on the premises where sold") must charge a consumer at least 10c per quart of milk, and the dealer must charge a "store" at least 8c per quart and 5c per pint. (The Act, § 301, defines a "Store" as a "grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment". Apparently "stores" form a subordinate class within the larger class of "dealers".) The store must charge the consumer at least 9c per quart of milk. Dealers and stores alike must charge consumers the same minimum price for pints of milk,—6c.

Under the wide definition of a "dealer" falls that class of persons who have automobiles, wagons and other delivery facilities and bring milk to the customer's door. Nebbia, the appellant, however, who sold milk to his customers in his grocery store (R 11, 1), could only sell a quart of milk at one cent less than the price charged by a dealer who delivers milk to the consumer's door. If some customer wanted to buy "cash and carry," a pint of milk, Nebbia was obliged to charge him the same price for the pint as the customer would pay Nebbia's competitor for delivering the pint to the customer's door. Quite obviously under such an order Nebbia could not for an instant compete with the delivery service for pint business; and as a practical matter the one-cent difference allowed him for quarts of milk which he sold "cash and carry," is obviously entirely inadequate to permit competition with delivery service.

In brief, the statute and order have the effect of obliging Nebbia to pay 8c per quart and 5c per pint for his milk, entirely destroy his competitive advantage as a "cash and carry" dealer in pints, and go almost as far in destroying his competitive advantage as a cash-and-carry dealer in quarts.

## SPECIFICATION OF THE ASSIGNED ERRORS TO BE URGED

The appellant respectfully represents to the Court that all eight of the assignments of error (R 7, 8) will be urged on the argument and in this brief. The substance of them all can be expressed very simply, as follows:—that the Statute,[1] and Order No. 5 of the Milk Control Board created by the Statute (R 2) deprived the appellant of his liberty and property without due process of law, and denied to him the equal protection of the laws in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States, and the New York Court of Appeals erred in not reversing the judgment of conviction on that ground.

## SUMMARY OF ARGUMENT

**The Statute and Order in question cannot be upheld unless the Federal Constitution has undergone profound changes since the United States Supreme Court decided**

*Adkins v. Children's Hospital* (1923), 261 U. S. 525; 67 L. Ed. 785.

*Wolff Packing Co. v. Court of Industrial Relations* (1923), 262 U. S. 522, 67 L. Ed. 1103.

*Tyson v. Banton* (1926), 273 U. S. 418; 71 L. Ed. 718.

*Fairmont Creamery Co. v. Minnesota* (1927), 274 U. S. 1; 71 L. Ed. 893.

*Williams v. Standard Oil Co.* (1929), 278 U. S. 235; 73 L. Ed. 287.

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[1] Chapter 158, Laws of 1933, of the State of New York; Article 25 of the Agriculture and Markets Law, § 312-E; this brief, page 29.

*New State Ice Co. v. Liebmann* (1932), 285 U. S. 262; 76 L. Ed. 747.

**The Statute attempts to apply the price-fixing feature of public utilities to the dairy business, which cannot constitutionally be so regulated.**

**The Statute, as applied to the appellant Nebbia by the Order (R. 2) of the Milk Control Board, discriminates unfairly against him as a "cash and carry" storekeeper, and deprives him of the equal protection of the laws, for it permits the dealer with a delivery service in substance to undercut the prices fixed by law for Nebbia; the order compels Nebbia to charge 6c per pint, and 9c per quart of milk sold over the counter, whereas his competitors are allowed to deliver to the customer's door pints of milk for the same price; and are allowed to deliver quarts at only a cent over the "cash and carry" price. Furthermore, under this order, Nebbia is obliged to pay 5c per pint and 8c per quart for his stock of milk, even though the person who supplies him is well content to receive 4c per quart and may profit handsomely at that price.**

**Nothing in the condition of the milk industry in the State of New York is such as to suspend the operation of the Fourteenth Amendment.**

*Ex Parte Milligan* (1866), 71 U. S. (4 Wall.) 2; 18 L. Ed. 281.

*United States v. Cohen Grocery Co.* (1921), 255 U. S. 80; 65 L. Ed. 516.

*Sterling v. Constantin* (1932), 287 U. S. 378, 77 L. Ed. 254.

**The housing cases, such as**

*Block v. Hirsch* (1921), 256 U. S. 135; 65 L. Ed. 865,

**and**

*Brown Holding Co. v. Feldman* (1921), 256 U. S. 170; 65 L. Ed. 877,

**do not support the constitutionality of the present statute and order. Those cases were based upon a scarcity of housing and a withholding of dwellings from the general public by landlords in an effort to exact an unreasonable rental. There is a vast difference between such a situation and the present, where in the words of Judge O'Brien (R 26) the markets are and, prior to the passage of this act, were flooded with a plethora of wholesome milk; and the Legislature, wishing to see deserving dairy farmers get more money for their product, has resorted (R 27) to the drastic remedy of fining or imprisoning small retail storekeepers who contract for the sale of milk at a price satisfactory to themselves and their customers.**

*Wolff Packing Co. v. Court of Industrial Relations* (1923), 262 U. S. 522; 67 L. Ed. 1103.

**Under the cases cited the judgment should be reversed.**

## POINT I

**Statutes similar to that here in question have repeatedly been held to be violative of the Fourteenth Amendment in attempting to fix prices for common commodities or services.**

Almost identical in its facts with the case at bar was

*Williams v. Standard Oil Co.* (1929), 278 U. S. 235; 73 L. Ed. 287.

There a Tennessee statute was called in question, which attempted to do for gasoline exactly what the statute here attempts to do for milk.

*Public Acts of Tennessee* (1927), Chapter 22, page 53.

This statute, like the Milk Control Act[1], starts out with a preamble which recites the private and public importance of the business concerned, recites that this business has become demoralized because of unfair and improper trade practices, and states that the sale and marketing of gasoline in Tennessee is impressed with a public use to preserve both public and private commerce and transportation.

To remedy these ills, the Statute created a Division of Motors and Motor Fuels, to be headed by a Superintendent. This officer was empowered to investigate the prices at which gasoline should be sold and to license applicants to sell at the price fixed. No person, firm or corporation was permitted to grant any rebate, concession or gratuity, directly or indirectly, to any customer to attract his business.

The similarity to the Milk Control Act is striking; the difference between the preambles of the two acts is purely one of rhetoric, not of substance.

The case[2] originated in the United States District Court, W. D., Tennessee, and resulted in a decree enjoining the state authorities from enforcing the statute. The United States Supreme Court affirmed[3], with an opinion by Mr. Justice Sutherland.

The opinion said, among other things[2]

> "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services

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[1] Chapter 158, New York Laws of 1933; Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29.

[2] *Williams v. Standard Oil Co.* (1929), 278 U. S. 235, 73 L. Ed. 287.

[3] *Ibid*, 278 U. S. 235, 239; 73 L. Ed. 287, 308.

rendered, or property used, unless the business or property involved is 'affected with a public interest'. * * * Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. Tyson & Bro.-United Theatre Ticket Offices v. Banton, *supra*, p. 434 [71 L. Ed. 724, 58 A. L. R. 1236, 47 Sup. Ct. Rep. 426]. Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Id. p. 430. The meaning and application of the phrase are examined at length in the Tyson Case, and we see no reason for restating what is there said.

In support of the act under review, it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such

articles, irrespective of its extent, does not come within the phrase 'affected with a public interest'. Those decisions control the present case."

The application of this decision to the case at bar is so direct that it needs no elaboration. The only important point of difference lies in the clause in the New York Milk Control Act[1] which purports to end the powers of the Milk Control Board on March 31, 1934. At a later point in this brief there will be a fuller discussion of the asserted proposition that a State Legislature can successfully invade the rights guaranteed by the Fourteenth Amendment, provided the invasion is committed in installments of a year at a time. In this connection it is worthy of note, as stated in the Joint Motion to Advance herein, at page 2, that while the New York statute in question will expire by its terms on March 31, 1934, "it is probable that the Legislature which convenes soon after January first and ordinarily continues until some time in April will find it necessary either to continue this or to enact some other legislation to accomplish similar purposes". The New York Emergency Rent Laws were first passed in 1920, and continued as part of the Civil Practice Act until June, 1929.

*New York Civil Practice Act*, § 1011 A.

The prospect of re-enactment need not be stressed. A single year of interference with normal price differentials between a cash-and-carry storekeeper and a competing dealer who delivers milk, is plenty of time to turn the storekeeper's trade over to his competitor.

In several important cases construing the Fourteenth Amendment, the United States Supreme Court has selected

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[1]New York Laws of 1933, Ch. 158; Article 25, Agriculture and Markets Law, § 319; this brief, page 46.

dairying and conducting grocery stores as some of the best possible examples of essentially private businesses, to which the traditional "public utility" concept can not be applied.

In

*New State Ice Company v. Liebmann* (1932), 285 U. S. 262, 277, 76 L. Ed. 747, 753,

the United States Supreme Court says, in the prevailing opinion of Mr. Justice Sutherland, speaking of the ice business:

> "It is a business as essentially private in its nature as the business of *the grocer, the dairyman* (our italics), the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. * * *"

Again in the same opinion the Court says[1]

> "There is no difference in principal between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed."

The Milk Control Law,[2] here under discussion, was drawn with the *Ice* case before the author, for the preamble con-

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[1] *New State Ice Company v. Liebmann* (1932), 285 U. S. 262, 279; 76 L. Ed. 747, 754.

[2] New York Laws of 1933, Ch. 158, Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29.

tains quotations from the opinion in the *Ice* case. In an effort to escape from the effect of that decision, the New York Legislature did not start out with a requirement that all new milk dealers obtain a "certificate of convenience and necessity". Instead the Legislature has proceeded to fix the minimum price of milk as though the supply were less than is actually the case. Obviously some persons, like Nebbia, will not be able to sell at the heightened price, inasmuch as there is an oversupply of milk for sale. To such a dealer the Legislature gives the alternative of voluntarily ceasing sales, or being obliged to cease under penal sanctions or injunctive process, or by being denied a license to carry on business. If enough people can thus be put out of the milk business, the effect will be the same as though a "certificate of convenience and necessity" were exacted as a condition of continuing to sell milk. The difference is one of form only. Under the *Ice* case[1], the "Public Utility" concept which the Legislature has attempted to apply to the New York milk industry, is unconstitutional.

> *Adkins v. Children's Hospital* (1923), 261 U. S. 525; 67 L. Ed. 785,

was a case arising under the Fifth Amendment, in which was called in question a statute[2] providing for the fixing, by a Board of three members, of minimum wages for women and children in the District of Columbia. The method of fixing the minima was strikingly like the method provided in the Milk Control Act[3] for fixing the minimum

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[1] *New State Ice Company v. Liebmann* (1932), 285 U. S. 262; 76 L. Ed. 747.

[2] Act of Sept. 19, 1918; 40 Stat. at L. 960, Ch. 174.

[3] New York Laws of 1933, Ch. 158, Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29.

prices of milk. The Supreme Court held the statute unconstitutional. In the course of the prevailing opinion[1] the court stresses the fact that one of the principal faults of the statute providing for fixing the minimum wage is that

> "the declared basis * * * is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals".

Similarily in the case at bar, the laudable desire to see the dairy farmer happier and more prosperous has brought the New York Legislature to say that regardless of the retail value of milk as fixed by over-supply and limited demand, the dealer must sell to his customers at a fixed minimum, or else not sell.

If he does sell, under § 312 (c)[2] a dealer must "give fair and reasonable effect to the intent" of the legislature "that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers". If he fails to live up to this vague standard, the dealer may have his license suspended or be proceeded against civilly and criminally.

In

> *Adkins v. Children's Hospital*, just cited (1923), 261 U. S. 525, 559; 67 L. Ed. 785, 797,

this Court further said,

> "Should a statute undertake to vest in a commission power to determine the quantity of food neces-

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[1] *Adkins v. Children's Hospital* (1923), 261 U. S. 525, 558; 67 L. Ed. 785, 796.

[2] New York Laws of 1933, Ch. 158, Article 25, Agriculture and Markets Law, § 312 (c); this brief, page 29.

> sary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed."

In the case at bar the New York Legislature has created a Board of three men to attempt to determine what prices for milk will yield the producer and dealer a reasonable return, and insure a supply of good milk; and makes underselling this price a jail offense. The relevance of the last quotation from the *Minimum Wage Case* is quite obvious.

No good purpose will be subserved by prolonging this part of the brief. Price or wage fixing by state statute has been found invalid by the Supreme Court in

*Wolff Packing Co. v. Court of Industrial Relations* (1923), 262 U. S. 522, 67 L. Ed. 1103. (Kansas statute regulating wages in the meat packing business during a declared "emergency".)

*Fairmont Creamery Co. v. Minnesota* (1927), 274 U. S. 1, 71 L. Ed. 893. (Minnesota statute forbidding a purchaser of dairy products to pay a higher price for the products in one locality than he paid in another.)

*Tyson v. Banton* (1926), 273 U. S. 418, 71 L. Ed. 718. (New York statute limiting the charge for theatre ticket brokerage to 50c.)

*Ribnik v. McBride* (1928), 277 U. S. 350; 72 L. Ed. 913. (New Jersey statute regulating rates charged by an employment agency.)

The price fixing features of the Milk Control Act[1] here under consideration falls with the other statutes mentioned. The contention that the State of New York is preserving the health, safety or morals of its people by fining or imprisoning storekeepers who sell milk for less than 9c per quart must fail, under established constitutional doctrine.

## POINT II

**The Milk Control Law,[1] as applied by Order No. 5 of the Milk Control Board,[2] discriminates unfairly against Nebbia as a cash and carry dealer in milk.**

The Act here in question bears upon the appellant principally through the Order (R 2) of the Milk Control Board fixing prices. By that Order, Nebbia was required to pay to whatever dealer sold him his milk, 8c per quart and 5c per pint. It is noteworthy that no such lower limit was placed by Order No. 5 on a dealer other than a storekeeper,—on a dealer with a delivery route, for example.

Nebbia, having paid 8c per quart and 5c per pint to the dealer who supplied him, was obliged to resell over his counter at not less than 9c per quart and 6c per pint. Some rival in trade, having no store, but a wagon and delivery route, had no lower limit set for the price at which he was obliged to buy his milk; and was allowed to sell pints of milk as low as Nebbia, with delivery to the customer's door as a bonus. When delivering a quart of milk, the route-dealer had to charge only a cent more than Nebbia, a most inadequate differential.

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[1] Chapter 158, New York Laws of 1933, Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29

[2] Record, page 2.

The unquestioned surplus of wholesome milk in New York State[1] results in competition to obtain buyers. Nebbia is obliged to sell as cheaply as possible to hold his business. This, of course, makes milk more accessible to the buying public in a time of dearth. Under the present law and

[1]Per O'Brien, J., People v. Nebbia (1933) 262 N.Y. 259, 275; R 26. "The markets are, and prior to the passage of this act, were flooded with a plethora of wholesome milk." Counsel for the respondent informs us that he proposes to hand to the Court copies of the "Report of the Joint Legislative Committee to Investigate the Milk Industry" dated April 10, 1933, being 1933 Legislative Document No. 114, and he has kindly furnished us with an advance proof of this interesting paper. The Report makes four points very clear.

(1) That production of milk is now at a point far above the average.
(2) That its wholesome quality is excellent, as evidenced by a new low record (in 1932) for milk-borne diseases.
(3) That with the general economic depression has come a decreased demand for milk, and,
(4) That as the public has much less money to spend, it has turned more and more to stores for milk, which it could, previous to the passage of the Milk Control Law, buy for cash over the counter at substantial savings over the cost of milk delivered on routes.

(1) *As to excess production,* the Report (page 15) says "Since 1927 the number of dairy cows in this state has increased about 10 per cent. The effect of this has been to increase the surplus of milk. Similar increases in the number of cows have occurred generally in the United States and are due to the periodic changes in number of heifer calves raised on farms." At page 16, the Report explains that "highs" and "lows" in the number of heifer calves

Order No. 5, Nebbia was obliged by the Milk Control Board to pay 8c a quart to the dealer who supplied him, and was obliged by pressure of competition caused by surplus milk to sell at 9c a quart. The practical effect is to limit his "mark-up" or gross profit per quart to one cent. He is

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raised to produce milk run in cycles of about fifteen years. At page 39, the Report quotes from Dr. G. F. Warren, of Cornell, who says, "Farmers all over the world raise too many heifers whenever cows pay and raise too few heifers when cows do not pay * * * (page 40). The highest prices ever paid for cows came in 1929. The high prices of cows for 1927 to 1930 resulted in raising too many heifers. These are now cows * * *." Again, at page 77, the Report quotes from Mr. L. A. Van Bomel, President of Sheffield Farms Company, one of the leading distributors of milk in the New York metropolitan market, who said "Very briefly it is our opinion that the present reduction in price is due to the operation of inevitable economic factors and conditions. In the first place, the general price level of commodities the world over had declined. In the second place, there is more milk being produced in the New York milk shed than this market can use in fluid form, with the result that the price has declined. In our opinion, no artificial device can be successfully employed to change the operation of the law of supply and demand."

(2) *As to the wholesome quality* of the milk so produced, the Report, page 28, finds that "the general level of purity and excellence of the milk supply, not only in New York City, but in New York State cities as a whole, is very good". A quotation is given from a statement made in February, 1933, by the New York State Department of Health, to the effect that, "The year 1932 closed with a new low record for milk-borne outbreaks of communicable diseases in the State, exclusive of New York City."

(3) *"The demand for milk and cream has been affected by the reduced purchasing power of consumers."* Report, page 15. "So far as the fluid milk industry in this state is concerned, lower commodity prices have been reflected

equally limited on purchases and sales of pints, and it is noteworthy that Nebbia and the route-dealer each had to charge 6c per pint for milk; but the route-dealer is allowed to give delivery service as a bonus. Nebbia, with a "cash-and-carry" business, can not legally give bread with milk to equalize this advantage.

Without protracting this discussion longer, it seems abundantly demonstrated that the Act as applied by Order No. 5 discriminates unfairly and arbitrarily against Nebbia as a cash-and-carry dealer.

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chiefly in a reduced demand for milk and cream. * * * In the past two years the per capita consumption has fallen off 10 per cent." Report, page 79.

(4) *Sales of milk in stores for a price lower than the "route price" have increased during the economic depression, with a decrease in the trade of the dealers with delivery routes.* Speaking of the New York metropolitan area, the Report, page 163, lists among the causes of increases in sales of bottled milk by stores the lower price as compared with the price on delivery routes, and "the greater necessity at the present time for consumers to save on their purchases of food". This was a substantial saving. "In October, 1931, more than half the cities in the United States of 100,000 or more population had a differential of from one cent to four cents a quart between the route price and the store price of bottled milk * * * In 1932 less than 10 per cent of the stores [in New York City] were getting as much as the retail price on routes, 42 per cent were selling at a discount of one cent, 25 per cent at a discount of two cents, and 20 per cent at a discount of three cents from the route price. The greatest disparity between store prices and route prices was found in Brooklyn and Queens where more than half the stores were selling at a discount of three cents or more per quart from the route price." Report, pages 248, 249.

One more word may be added, however. Under § 301 of the Act,[1] if Nebbia could conceivably buy his milk from a producer (i. e., farmer) who delivers milk only to a dealer, the law might be construed to allow him under Order No. 5 (R 2) to pay the producer whatever price they agreed on, provided Nebbia, as required by § 312-c, would "give fair and reasonable effect to" * * * "the intent of the legislature that * * * the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers". If Nebbia failed in this attempt to follow an indefinite standard, he could be jailed, fined, enjoined, or have his license suspended, under § 312-c of the Milk Control Law.

See

*International Harvester Co. v. Kentucky* (1914), 234 U. S. 216; 58 L. Ed. 1284,

and

*United States v. Cohen Grocery Co.* (1921), 255 U. S. 81; 65 L. Ed. 516.

## POINT III

**The economic depression now affecting the dairy farmers of New York does not suspend the operation of the Fourteenth Amendment.**

This brief might well have come to an end with Point II, were it not for the necessity of discussing what certain writers call the "emergency doctrine". Under the cases cited in Points I and II, little can be said in favor of the constitutionality of the act and order fixing retail prices for milk,

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[1] New York Laws of 1933, Ch. 158; Agriculture and Markets Law, Article 25, § 301; this brief page 29.

except that the dairy farmers are in distress and that the present statute is only to operate for a year unless repassed by the 1934 Legislature.

See *Joint Motion To Advance Herein*, pg. 2.

To Nebbia's protest that the State has invaded his established constitutional rights, the State answers, "Yes, but we've only done it for a year, subject to repassage of the bill for an additional year, and so on."

The appellant sees with solemn concern the possible genesis in the case at bar of a doctrine that whenever popular excitement rises high enough to be reflected in temporary legislation which would unquestionably be void if permanent, the stabilizing limitations of the Federal Constitution cease to be operative.

The Fourteenth Amendment was not adopted in fair weather; nor was its operation intended to be limited to times of general content, when no state is pressed to abridge the liberty and property of the individual. Surely the protection of the Constitution does not cease when the need for it is greatest.

In

*Ex Parte Milligan* (1866), 71 U. S. (4 Wall.) 2, 120; 18 L. Ed. 281, 295,

the Court said,

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just

> and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

See also

*United States v. Cohen Grocery Co.* (1921), 255 U. S. 81, 88; 65 L. Ed. 516, 520,

and

*Sterling v. Constantin* (1932), 287 U. S. 378; 77 L. Ed. 254.

*Wilson v. New* (1917), 243 U. S. 332; 61 L. Ed. 755,

does not support the legislation now in question. That case is an illustration of the power of Congress to regulate common carriers by rail in interstate commerce; the Supreme Court has often pointed out the fact that power to regulate the affairs of the traditional "public utility" does not include power to fix prices or rates in the "common callings" such as those of the dairyman, the grocer, the butcher and the baker.

Nor do the housing cases,

*Block v. Hirsch* (1921), 256 U. S. 135; 65 L. Ed. 865,

and

*Brown Holding Co. v. Feldman* (1921), 256 U. S. 170; 65 L. Ed. 877,

support the validity of the Milk Control Law now before this Court. Those decisions undoubtedly went to the very limit of the police power. They were based upon a shortage of houses and a multitude of persons anxious for housing, which allowed a grasping landlord to victimize the tenant for his own profit. The statutes which penalize forestalling, engrossing, usury, and combining to restrain trade express the same policy.

At the opposite extreme is the statute now before the Court. With the State of New York flooded with wholesome milk, the Legislature and Milk Control Board purport to fine and jail anyone who sells it to the public below the price set by order. There is a certain grammatical symmetry in the statement that if a Legislature can provide for fixing a maximum price for houses it can provide for fixing a minimum price for milk; but the resemblance between the two is purely verbal.

In

*Wolff Packing Co. v. Court of Industrial Relations* (1923), 262 U. S. 522; 67 L. Ed. 1103,

the Supreme Court had before it a case of so-called "emergency" minimum fixing very similar to the present. Under the Kansas Industrial Relations Act, Chapter 29, Laws of Kansas, Special Session, 1920, page 35, the Industrial Relations Court found that an emergency existed in the meat packing business, and therefore fixed the wages to be paid by Wolff Packing Co. The Legislature had declared this business to be affected with a public interest.

In a mandamus proceeding to compel compliance with the mandate of the Industrial Court, the Supreme Court of Kansas held that the emergency contemplated by the stat-

ute existed, and issued the peremptory writ. Burch, J., dissenting from the court's opinion, pointed out

> "So far as it is involved in this case, the act creating the court of industrial relations belongs in the class of statutes beginning to be known in the field of constitutional law as emergency statutes. The court of industrial relations is to do for this state, by means of orders respecting the conduct of essential industries, what Congress did for the United States when it passed the Adamson law, and what the Legislature of New York did for the people of that state when it passed the emergency housing laws."
>
> *Court of Industrial Relations v. Wolff Packing Company* (1922), 111 Kansas, 501, 509.

By writ of error this case came before the United States Supreme Court. In support of the statute argument was made in the brief that the packing business was affected with a public interest, and the existence of an emergency was urged upon this Court. The cases said to uphold the "emergency doctrine",

*Wilson v. New* (1917), 243 U. S. 332; 61 L. Ed. 755,

*Block v. Hirsch* (1921), 256 U. S. 135; 65 L. Ed. 865,

and

*Brown Holding Co. v. Feldman* (1921), 256 U. S. 170; 65 L. Ed. 877,

were all cited as authorities upholding the Kansas legislation. It was pointed out that the order was subject to modification after sixty days, and the Court was urged to hold that for this trial period the Packing Company should have complied with the order fixing the minimum wage.

Thus in 1923 when the *Wolff*[1] decision was handed down, the United States Supreme Court had before it an "emergency" case, where a minimum wage was sought to be fixed. The housing decisions were before the Court. Practically every element which can be urged for the sustaining of the New York Milk Control Law was present in the *Wolff* case.

But the United States Supreme Court held the Kansas statute unconstitutional. The opinion of Chief Justice Taft, writing for the Court, includes these words[2] which might well have been written of the case at bar,—

> "It has never been supposed, since the adoption of of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."

The Chief Justice then refers to certain businesses which he had previously discussed, which "have come to hold such a peculiar relation to the public that" some government regulation is superimposed upon them, and significantly he lists the *housing* case, *Block v. Hirsch* (1921), 256 U. S. 135; 65 L. Ed. 865, as an example of such a business. Of such businesses he says

> "In nearly all the business included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.
>
> In the preparation of food, the changed conditions have greatly increased the capacity for treating the

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[1] Wolff Packing Company v. Court of Ind. Rel. (1923), 262 U. S. 522; 67 L. Ed. 1103.

[2] 262 U. S. 537, 538; 67 L. Ed. 1109, 1110.

raw product, and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods."

The milk situation in New York is at the pole opposite to monopoly. A great abundance of wholesome milk is for sale by a multitude of dealers and storekeepers, of whom the appellant is one. The statute and order seek arbitrarily to fix prices for this milk at a level higher than the natural abundance would indicate. Such regulation is unconstitutional, and can not stand.

**The appellant respectfully submits that the judgment of the Court of Appeals should be reversed.**

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# APPENDIX

## LAWS OF NEW YORK.—By Authority

### CHAPTER 158

AN ACT to amend the agriculture and markets law, in relation to milk control during the existing emergency, creating the milk control board and defining its jurisdiction, powers and duties

Became a law April 10, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Article twenty-five of chapter forty-eight of the laws of nineteen hundred twenty-two, re-entitled by chapter two hundred and seven of the laws of nineteen hundred twenty-seven, "An act in relation to agriculture and markets, constituting chapter sixty-nine of the consolidated laws," comprising sections two hundred and ninety-two to two hundred and ninety-seven, both inclusive, is hereby renumbered article twenty-six, and such sections are hereby renumbered sections three hundred and fifty to three hundred and fifty-five, respectively, and such chapter is hereby amended by adding a new article, to be article twenty-five, to read as follows:

ARTICLE 25

MILK CONTROL

Section 300. Legislative finding; statement of policy.
301. Definitions.
302. Milk control board.
303. General powers.
304. Rules and orders.
305. Investigations.*
306. Entry and inspection.
307. Violations; remedies.

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* So in original. [Does not conform to section heading.]

308. Licenses to milk dealers; suspension; revocation; review.
309. Records.
310. Reports.
311. Report of receipts.
312. Order fixing price of milk.
313. Legislative intent.
314. Interstate and federal compacts.
315. Reports to governor and legislature.
316. Partial invalidity.
317. Construction, exceptions and limitations.
318. Saving clause.
319. Duration of board.

§ 300. **Legislative finding; statement of policy.** This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local gov-

ernmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination.

§ 301. **Definitions.** As used in this article, unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

"Commissioner" means the commissioner of agriculture and markets.

"Board" means the temporary state agency created by this article, to be known as the "Milk control board."

"Director" means the director of the milk control board.

"Person" means any person, firm, corporation or association.

"Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

"Market" means any city, town or village of the state, or two or more cities and/or towns and/or villages and surrounding territory designated by the board as a natural marketing area.

"Licensee" means a licensed milk dealer.

"Milk" means liquid milk and/or cream fresh, sour or storage; and/or condensed or concentrated whole milk, except when contained in hermetically sealed cans. In each instance where quantity is referred to the intent is to include its whole milk equivalent.

"Producer" means a person producing milk within the state of New York.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

§ 302. **Milk control board.** There shall be in the department of agriculture and markets a milk control board, to consist of the commissioner of agriculture and markets, the commissioner of health, and the director of the milk control board. The commissioner of agriculture and markets and the commissioner of health shall receive no additional compensation for services rendered pursuant to this article, but shall be allowed their actual and necessary expenses incurred in the performance of their duties under this article. The director shall be appointed by the governor and serve during his pleasure. The director shall receive a compensation to be fixed by the governor within the amount available by appropriation. Technical, legal and other services for such board shall be performed, so far as practicable, by forces or officers in the department of agriculture and markets and by forces or officers in the department of health, without additional compensation, but the commissioner may appoint and at pleasure remove such additional technical, legal and other assistants and employees as may be necessary to carry out the provisions of this article, prescribe their powers and duties, and fix their compensation within the amount available by appropriation. The director and the additional technical, legal and other assistants and employees appointed by the board, shall be exempt from civil service examination and the provisions of the civil service law and rules. The commissioner of agriculture and markets shall be the administrative head of the board. Each member of the board shall execute and file with the comptroller a bond conditioned for the safe-keeping and lawful application of moneys coming to the board and under his control in such amount as may be approved by the head of the department of taxation and finance. The commissioner

shall, subject to the limitations of this article and of law, enforce the provisions of this article, but no official act shall be taken, rule or regulation promulgated, or official order made or enforced, with respect to the provisions of this article, without the approval of a majority of the members of the board. The commissioner of agriculture and markets may by official order filed in the office of the department of agriculture and markets designate a deputy, assistant or other subordinate in the department of agriculture and markets, to perform the duties of the commissioner, and the commissioner of health by official order filed in the office of the department of health may designate a deputy, assistant or other subordinate in the department of health to perform the duties of the commissioner of health under this article. The person, if any, designated pursuant to this section, shall have the powers and be subject to the duties and responsibilities of the officer appointing him. Such designation shall be deemed temporary only and shall not affect the civil service or retirement rights of the person designated. The persons so designated shall not receive any additional compensation for the services performed, but shall be allowed their actual and necessary traveling and other expenses incurred in the performance of their duties under this article. The principal office of the board shall be in the city of Albany, in rooms assigned by the superintendent of public buildings, but offices in other localities may be maintained by the board.

§ 303. **General powers**. The board is hereby declared to be the instrumentality of the state for the purpose of attaining the ends recited in the legislative finding, statement of policy and application of article, and is hereby vested with power:

(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York; provided, however, that nothing contained in this article shall be construed to abrogate or affect the status, force or operation of any provision of the public health law, the public service law,

the state sanitary code or any local health ordinance or regulation.

(b) To investigate as the emergency permits and regulate as the emergency requires all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the state of New York. The board shall have the power to subpoena milk dealers, their records, books and accounts, and any other person from whom such information may be desired to carry out the purpose and intent of this article and may issue commissions to take depositions of witnesses absent from the state. Any member of the board or designated employee may sign and issue subpoenas and may administer oaths to witnesses. The provisions of the civil practice act in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee, or other person, or a board or committee, in a matter not arising in an action in a court of record shall apply to a subpoena issued by the board as authorized in this section.

(c) The board may act as mediator and arbitrator in any controversy or issue that may arise among or between milk producers and milk dealers as between themselves or that may arise between them as groups.

(d) The operation and effect of any provision of this article conferring a general power upon the board shall not be impaired or qualified by the granting to the board by this article of a specific power or powers.

§ 304. **Rules and orders.** The board may adopt and enforce all rules and all orders necessary to carry out the provisions of this article. Every rule or order of the board shall be posted for public inspection in the main office of the board and a certified copy filed in the office of the department of state. An order applying only to a person or persons named therein shall be served on the person or persons affected. An order herein required to be served shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope with postage prepaided to each person affected thereby, or, in the case of a corporation, to any officer or agent of the corporation

upon whom a summons may be served in accordance with the provisions of the civil practice act. The posting in the main office of the board of any rule, and of any order not herein required to be served, and such filing in the office of the department of state, shall constitute due and sufficient notice to all persons affected by such rule or order. A rule of the board when duly posted and filed as provided in this section shall have the force and effect of law. The provisions of this section as to service of orders shall not apply to orders fixing prices of milk as to which provision is made in section three hundred twelve of this article.

§ 305. **Investigations.** The practice and procedure under this article with respect to any investigation by the board authorized by this article, except as otherwise expressly provided by this article, shall be in accordance with the provisions of article three of this chapter and all of the provisions of such article not inconsistent with the provisions of this article shall apply to such investigation.

§ 306. **Entry and inspection.** Any member of the board or employee designated for the purpose, shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured into food products. Any member of the board or designated employee also shall have power to inspect all books, papers, records or documents in any place within the state for the purpose of ascertaining facts to enable the board to administer this article.

§ 307. **Violations; remedies.** A violation of any provision of this article or of any rule or order of the board lawfully made, except as otherwise expressly provided by this article, shall be a misdemeanor punishable by a fine not exceeding one hundred dollars, or by imprisonment not exceeding one year, or both, and each day during which such violation shall continue shall be deemed a separate violation. The board may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of this article or to enforce compliance with any rule or order of the board made pursuant to the provisions of this article, and in addition to any other remedy may apply to the supreme court in the third judicial dis-

trict, for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that an adequate remedy at law does not exist.

§ 308. **Licenses to milk dealers; suspension; revocation; review.** 1. No milk dealer, as defined in this article, shall buy milk from producers or others for sale within this state, or sell or distribute milk therein unless such dealer be duly licensed as provided in this section, and it shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or, in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this article. The board may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. The board may by official order exempt stores from the license requirements provided by this article where no milk is delivered therefrom to consumers by vehicle.

2. An application for a license to operate as a milk dealer shall be made within thirty days after this article takes effect for the license period commencing May first, nineteen hundred thirty-three and ending March thirty-first following, by mail or otherwise, to the board upon blanks prepared under authority of the board. The applicant shall state the nature of the business to be conducted, the full name of the person applying for the license, and if the applicant be a firm or association, the full name of each member, and if a corporation the names and addresses of all officers and directors, and the city, town or village and the street number, if any, at which the business is to be conducted; facts showing that the applicant has adequate technical personnel, adequate technical and physical facilities to properly conduct the business of receiving and handling milk; that he has complied with all rules and orders of the board filed or served as required in this article, and such other facts with respect to the license as may be required by the board pursuant to this article. Such application shall be accompanied

by the license fee required to be paid by this section. A license shall be granted to the applicant by the board, subject to the provisions of this article.

3. The board may decline to grant a license or may suspend or revoke a license already granted upon due notice and opportunity of hearing to the applicant or licensee, when satisfied of the existence of any of the following:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased from a producer or has rejected without reasonable cause or reasonable advance notice, milk delivered by or on behalf of a producer in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased from a producer.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the board of his inability or unwillingness properly to conduct the business of receiving or selling milk.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A co-operative

association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monoply* nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where the milk dealer has continued in a course of dealing of such nature as to satisfy the board of an intent to deceive or defraud producers or consumers.

(h) Where there has been a failure either to keep records or to furnish the statements or information required by the board.

(i) Where it is shown that any statement upon which the license was issued is or was false or misleading in any particular.

(j) Where the applicant is a partnership or corporation and any individual holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the licensee has violated any of the provisions of this article.

4. A milk dealer receiving during any of the twelve calendar months immediately preceding the period for which the license is issued, a daily average total quantity of milk not exceeding four thousand pounds, shall pay a license fee of twenty-five dollars; a milk dealer receiving a daily aver-

* So in original. [Word misspelled.]

age total quantity of milk of more than four thousand pounds and not exceeding twenty thousand pounds, shall pay a license fee of seventy-five dollars; a milk dealer receiving a daily average total quantity of milk of more than twenty thousand pounds and not exceeding one hundred thousand pounds, shall pay a license fee of two hundred and fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than one hundred thousand pounds, and not exceeding five hundred thousand pounds, shall pay a license fee of seven hundred fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than five hundred thousand pounds, and not exceeding one million pounds, shall pay a license fee of twenty-five hundred dollars; a milk dealer receiving a daily average total quantity of milk of more than one million pounds, shall pay a license fee of five thousand dollars. Milk dealers who have not previously engaged in such business during such prior year shall pay such minimum license fee and in addition thereto, at such time or times as the board may fix, pay an additional sum based upon the daily average total quantity of milk received by such dealers during the license period as fixed by this article. It is not the intent that milk utilized or sold in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of cream, and/or condensed or concentrated milk, except when sold in hermetically sealed cans, shall be included in such determination. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall not be included in the determination of the license fee.

5. The board may classify licenses and may issue licenses to milk dealers to store, manufacture or sell milk limited to a particular city or village or to a particular market or markets in the state.

6. The official order of the board, in refusing to issue a license, or in suspending or revoking a license, may be reviewed by certiorari in the manner provided by the civil practice act.

§ 309. **Records.** The board may require licensees to keep the following records:

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the manufacture of each product. Also the quantity and value of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(g) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(h) Such other records, and information as the board may deem necessary for the proper enforcement of this article.

§ 310. **Reports.** Each licensee shall, from time to time, as required by rule or order of the board, make and file a verified report on forms prescribed by the board of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purpose and intent of this article. Such report shall cover a period of time specified in the order.

§ 311. **Report of receipts.** On or before the tenth day of each month, the board shall pay over to the department of taxation and finance, division of finance, all receipts of the board on account of license fees and other moneys received by the board during the preceding month. Such moneys shall be paid into the state treasury, to the credit of the gen-

eral fund. On or before the tenth day of each month the board shall make a verified and detailed report to the department of taxation and finance of all receipts of the board for the preceding month.

§ 312. **Order fixing price of milk.** (a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers except for consumption on the premises where sold.

4. When, pursuant to statute, regulations adopted thereunder, or ordinance, various grades of milk are specified, the board shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable.

(c) It is the intent of the legislature that the public emergency requires that the benefits of any increase of prices received by milk dealers by virtue of the minimum price pro-

visions of this section shall be given to producers. To that end, if the board after investigation made either upon its own initiative or upon complaint of a representative group of producers supplying a particular dealer shall determine that such milk dealer purchasing milk from producers or from or through a cooperative corporation of producers organized under or subject to the provisions of chapter seventy-seven of the consolidated laws, in making such purchases has failed to give fair and reasonable effect to such intent, the board shall, upon due notice and after a hearing suspend or revoke the license of the milk dealer so offending and in addition thereto, a violation of this subdivision shall render such offending milk dealer subject to the provisions of section three hundred seven of this article.

(d) The board after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular market may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of the various forms included within the definition of milk as used in this article and its various grades and uses. The order of the board with respect to the minimum prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold and may vary in different localities or markets according to varying uses and differing conditions. Each such order may classify such milk by forms, classes, grades or uses as the board may deem advisable and may specify the minimum prices therefor.

(e) After the board shall have fixed prices to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, or

rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise, except as provided in subdivision c of section three hundred and seventeen of this article.

(f) The board may upon its own motion or upon application from time to time alter, revise or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising or amending any order fixing the price to be charged or paid for milk, the board shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the board shall afford sufficient notice and publicity. Such order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.

§ 313. **Legislative intent.** It is the intent of the legislature that no provision of this article shall prevent, and no provision contained therein shall be deemed or construed to prevent a cooperative corporation, organized or operated

under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, from blending the net proceeds of all its sales in various classes and whether in fluid form or as manufactured products, both within and without the state, and paying its producers such blended price, with such deductions and/or differentials as may be authorized under contract between such corporation and its producers, or from making collective sales of the milk of its members and/or other producers represented by it, at a blended price based upon sales thereof in the various classes, and whether in fluid form or as manufactured products, both within and without the state, and which price is to be paid either directly to the producers or to the cooperative corporation. Nothing herein contained shall prevent any milk dealer from contracting for his milk with such cooperative corporation upon such basis. Also that no provision of this article shall be deemed or construed to affect the contracts of such a cooperative corporation with its producers nor to affect or abridge the rights and powers of such a corporation conferred by the provisions of such chapter or any of its operations thereunder, except as in this article otherwise provided.

§ 314. **Interstate and federal compacts.** The board is hereby vested with authority to confer with legally constituted authorities of other states and of the United States, with respect to a uniform milk control within the states and/or as between states, and may enter into a compact or compacts for such uniform milk control, subject to such federal approval as may be required by law.

§ 315. **Reports to governor and legislature.** The board shall, when requested, make reports of its proceedings to the governor and to the chairman of the finance committee of the senate and the chairman of the ways and means committee of the assembly.

§ 316. **Partial invalidity.** If any clause, sentence, paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the re-

mainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered.

§ 317. **Construction, exceptions and limitations.** (a) The licenses required by this article shall be in addition to any other license required by this chapter or otherwise required by law, and this article shall apply to the city of New York, but shall not be construed to conflict, alter or repeal laws now in force relating to the board or department of health of the city of New York, nor the sanitary code now in force in such city or any amendments thereof duly adopted, nor shall any provisions of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the sanitary code or the regulations of the board of health of the department of health of the city of New York, apply to the city of New York or to the production and transportation of milk for said city.

(b) This article shall not apply to certified milk, nor to milk sold to the state or any municipality or to the federal government upon bids.

(c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city.

§ 318. **Saving clause.** No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto.

§ 319. **Duration of board.** The board shall continue with all the powers and be subject to all the duties and responsibilities prescribed by this article until March thirty-first, nineteen hundred thirty-four, at which time the board shall be deemed abolished and the powers, duties and jurisdiction conferred or imposed upon the board by this article shall terminate. All books, papers, records and documents in the possession of the board when terminated shall be delivered to the department of agriculture and markets.

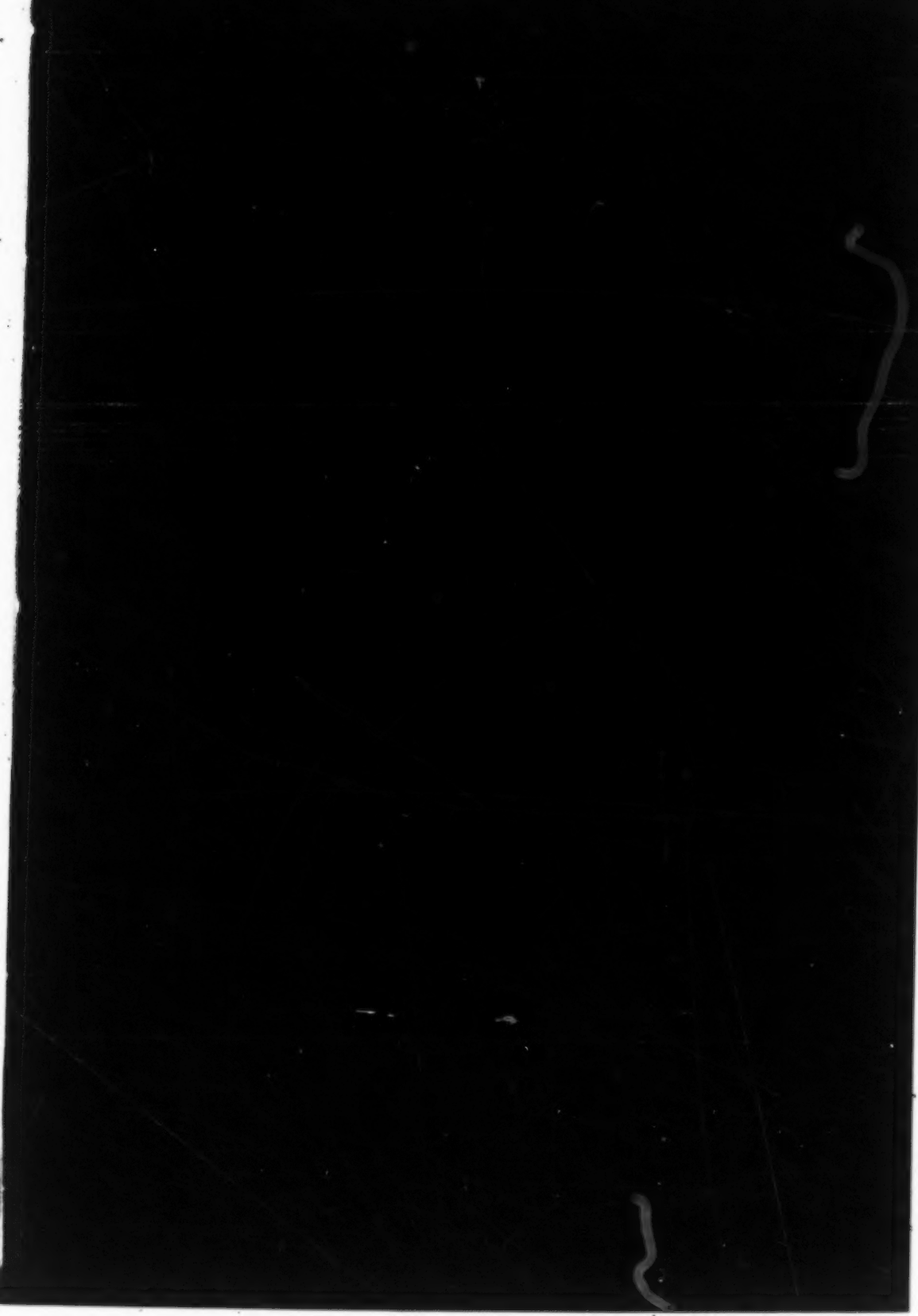
§ 2. This act shall take effect immediately.

STATE OF NEW YORK,
Department of State. } *ss:*

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
*Secretary of State*

Daily Record Company
Rochester, New York



## SUBJECT INDEX.


| | Page |
|---|---|
| Statement as to Jurisdiction | 1 |
| Importance of the Appeal | 2 |
| Only question is Constitutionality of Statute under Due Process Clause of Fourteenth Amendment | 3 |
| Parts of Statute directly involved | 4 |
| Legislative Findings of Fact | 7 |
| Evidence Supporting the Findings | 10 |
| (a) Evidence of an emergency | 11 |
| (b) Evidence that because of peculiar conditions in the milk industry the emergency would not be self-curative | 13 |
| (c) Evidence that price-cutting in sales from stores to consumers was a serious factor | 19 |
| Similar laws in other states | 22 |
| The usefulness of the New York Milk Control Law has been demonstrated | 27 |
| Summary of Argument | 29 |
| Point I. The necessity for any particular exercise of the police power is a matter to be determined in the first instance by the legislature. In the present case such a legislative determination has been made and no reason appears why it should be disturbed | 30 |
| Point II. The distribution of milk is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility | 37 |
| Point III. Fixing minimum prices to consumers is a common form of utility regulation | 43 |
| Point IV. The power to fix minimum prices to consumers is an important and desirable feature of the Milk Control Law. It has an actual relation to the public interest and should be sustained | 47 |
| Point V. The statute is constitutional and the judgment of conviction should be affirmed | 50 |
| Constitutionality of Regulating Milk as a Public Utility, reprinted from 18 Cornell Law Quarterly 410 | 51 |


## TABLE OF CASES CITED.


| | |
|---|---|
| Appalachian Coals, Inc. v. U. S., 288 U. S. 344 | 38 |
| Atchison etc. Co. v. U. S., 284 U. S. 248 | 31 |
| Atlantic Coast Line v. Goldsboro, 232 U. S. 548 | 36 |
| Barbier v. Connolly, 113 U. S. 27 | 36 |
| Barnes v. New York, 266 U. S. 581 | 1 |
| Beck v. Wallace, 41 Wash. L. R. 833 | 26 |

| | Page |
|---|---|
| Block v. Hirsch, 256 U. S. 135 | 33, 34 |
| Buck v. Kuykendall, 267 U. S. 307 | 4 |
| C. B. & Q. R. Co. v. Illinois, 200 U. S. 561 | 36 |
| Camfield v. United States, 167 U. S. 518 | 36 |
| Capital City v. Wallace, Sup. Ct. D. C. 1933 | 26 |
| Chicago Board of Trade v. Olsen, 262 U. S. 1, 10-15, 37-38 | 34 |
| Champlin Rfg. Co. v. Com'n., 286 U. S. 210 | 5 |
| Cline v. Frink Dairy Co., 274 U. S. 445 | 61 |
| Cofman v. Osterhaus, 40 N. D. 390 | 63 |
| Collins v. Texas, 223 U. S. 288 | 4 |
| Dayton-Goose Creek v. U. S., 263 U. S. 456 | 46 |
| Diorio v. Morris, Super. Ct. Conn., 1933 | 24 |
| District of Columbia v. Brooke, 214 U. S. 138 | 36 |
| Durham R. Co. v. La Fetra, 230 N. Y. 429 | 27, 32, 35, 36 |
| Economy Dairy v. Wallace, 41 Wash. L. R. 633 | 26 |
| Eubank v. Richmond, 226 U. S. 137 | 36 |
| Fairmount Creamery v. Minn., 274 U. S. 1 | 39, 61, 63 |
| Frost v. Corp. Com'n., 278 U. S. 515 | 58 |
| Gladstone Dairy v. Hill, Cir. Ct. Wis. 1933 | 23 |
| Gorham Mfg. Co. v. Tax Com'n., 266 U. S. 265 | 4 |
| Great Northern v. P. S. C., 88 Mont. 180 | 45 |
| Green v. Frazier, 253 U. S. 233 | 59 |
| Guillotte v. New Orleans, 12 La. Ann. 432 | 44 |
| Hall v. Geiger-Jones Co., 242 U. S. 539 | 37 |
| Highland v. Russell Car, 279 U. S. 254 | 37 |
| Home Bldg. etc. v. Blaisdell, 249 N. W. 334 | 31 |
| James Everard's v. Day, 265 U. S. 545 | 34 |
| Jones v. Portland, 245 U. S. 217 | 59 |
| Kroger Grocery etc. Co., Sup. Ct. Ohio, 1933 | 25 |
| Levy Leasing Co. v. Siegel, 258 U. S. 242 | 35 |
| Lewis v. New York, 289 U. S. 709 | 1 |
| Manigault v. Springs, 199 U. S. 473 | 36 |
| Matter of Rutledge, 162 N. Y. 31 | 5 |
| Miller v. Schoene, 276 U. S. 272 | 37 |
| Mobile v. Yuille, 3 Ala. 140 | 43 |
| Munn v. Illinois, 94 U. S. 113 | 43, 55 |
| New State Ice Co. v. Liebmann, 285 U. S. 262 | 31, 39, 40, 58, 63 |
| Nicchia v. New York, 254 U. S. 228 | 1 |
| Noble State Bk. v. Haskell, 219 U. S. 104 | 36, 38 |
| O'Gorman & Young v. Hartford, 282 U. S. 251 | 58, 61 |
| Otis v. Parker, 187 U. S. 606 | 38 |
| People v. Karr, 240 N. Y. 348 | 5 |
| People v. Milk Exchange, 145 N. Y. 267 | 16 |
| People v. Perretta, 253 N. Y. 305 | 36, 62 |
| People v. Ryan, 230 App. Div. 252 | 63 |
| People v. Teuscher, 248 N. Y. 454 | 62 |
| Powell v. Pennsylvania, 127 U. S. 678 | 34 |
| Pub. S. C. v. Utilities Co., 289 U. S. 130 | 45 |
| Radice v. New York, 264 U. S. 292 | 1 |

| | Page |
|---|---|
| Ribnik v McBride, 277 U. S. 350 | 58 |
| Roman v. Lobe, 243 N. Y. 51 | 26 |
| Slaughterhouse Cases, 16 Wall. 36 | 44 |
| Sligh v. Kirkwood, 237 U. S. 52 | 37 |
| So. Glens Falls v. P. S. C., 225 N. Y. 216 | 46 |
| Standard Oil v. Lincoln, 275 U. S. 504 | 59 |
| State v. Central Lumber Co., 226 U. S. 157 | 61 |
| Stephenson v. Binford, 287 U. S. 251 | 38, 58, 60 |
| Tagg Bros. etc. v. U. S., 280 U. S. 420 | 58 |
| Town of Mapleton v. P. S. C., 209 Iowa 400 | 47 |
| Tyson & Bro. v. Banton, 273 U. S. 418 | 58 |
| United States v. Calistan, U. S. Dist. Ct. 1933 | 26 |
| United States v. Macintosh, 283 U. S. 605 | 37 |
| Weller v. New York, 268 U. S. 319 | 1 |
| Williams v. Standard Oil, 278 U. S. 235 | 39, 58, 63 |
| Wilson v. New, 243 U. S. 332 | 34, 35 |
| Wolff P. Co. v. Industrial Ct., 262 U. S. 522 | 57 |


## MISCELLANEOUS CITATIONS


| | |
|---|---|
| Canadian Forum, July 1933 | 23 |
| Columbia L. Rev., June 1933 | 31 |
| Cornell L. Quarterly, April 1933 | 51 |
| " " " vol. 14 | 59 |
| Dairy Farm Report, Nov. 1933 | 28 |
| Governor's Message, Aug. 4, 1933 | 12, 29 |
| Harvard L. Rev., vol. 38 | 64 |
| " " " vol. 41 | 59 |
| Holmes, The Common Law | 26 |
| Journal of Land, etc. Ec., Aug. 1933 | 23 |
| National City Bank bulletin | 15 |
| New Outlook, June 1933 | 12 |
| " " Oct. 1933 | 13 |
| New York Legis. Doc., 1920 | 51 |
| " " Senate " 1910 | 51 |
| New York Times, Aug. 24, 1933 | 28 |
| " " " Sept. 3, 1933 | 16 |
| Patterson & Scholz, Economic Problems | 17 |
| Slichter, Modern Economic Society | 17 |
| Spencer, Report of Oct. 17, 1933 | 17 |
| Ten Eyck Report, 1927 | 14 |
| U. S., News, Nov. 18, 1933 | 29 |
| Yale Law Jour., Apr. 1933 | 31 |
| " " " vol. 39 | 59 |
| " " " vol. 42 | 31, 47, 49 |

# Supreme Court of the United States

**OCTOBER TERM, 1933.**

**No. 531.**

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LEO NEBBIA,

*Appellant,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

*Appellee.*

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## BRIEF FOR APPELLEE.

We present no jurisdictional question. Possibly the appellant should have directed his appeal to the judgment of the Monroe County Court entered after affirmance by the Court of Appeals (R 29, 30), instead of directing his appeal to the judgment of the Court of Appeals (R 5, 6, 7) which was merely of affirmance and remittitur (R 29). That is the interpretation which formerly was placed upon Judicial Code §237 (now U. S. Code, Title 28, §344). See for examples, *Nicchia v. New York*, 254 U. S. 228; *Radice v. New York*, 264 U. S. 292; *Barnes v. New York*, 266 U. S. 581; *Weller v. New York*, 268 U. S. 319. It does not appear that any change in that respect has been made by the Act of Jan. 31, 1928 (U. S. Code, Title 28, §861-a). See *Lewis v. New York*, 289 U. S. 709. However that may be, nothing of substance has been omitted relative to the present appeal and its intent is clear.

## Importance of the Appeal.

The facts presented, considered by themselves, are trivial and even frivolous. A small storekeeper of Rochester has sold two bottles of milk for eighteen cents, the minimum price established by the Milk Control Board, and with it as an inducement to its sale he has given away a loaf of bread worth five cents. For this offense against society he has been fined five dollars. At first glance there seems to be nothing in this transaction to occupy the time of a high appellate court.

The importance of the case derives from the defense which was interposed.

New York State is the richest and most populous State of the United States, and its dairy industry affects more people than any other business in the State. In the supposed interest of that dairy industry and public welfare generally New York State very solemnly enacted a law under which minimum prices for the sale of milk are established. The criminal action is a means of enforcing compliance by this small storekeeper. He has submitted to the courts, as his defense, that this legislation, although it represents the present will of his fellow-citizens, is unreasonable and arbitrary, and forbidden by certain provisions of a written constitution.

Small as may be the material interest of the defendant, it becomes a very important thing when thus set up as an obstacle to carrying out a state program, and the defendant is entitled to have his constitution-

al right as seriously considered before this Court as any common interest of all the People of the State of New York. In such a litigation there is no big and no little.

## Only Question Is Constitutionality of Statute Under Due Process Clause of Fourteenth Amendment.

We note that Point II of Appellant's Brief in this Court, and the Assignments of Error, numbers 4, 5, 6 and 8 (R 7, 8) are directed to the Order of the Milk Control Board rather than the statute. No argument suggesting that the Order might be invalid irrespective of the statute was made before the Court of Appeals, or (so far as we know) before any court below. Although the constitutional objections urged before the Rochester City Court were directed to "the statute and order" (R 11), no distinction seems to have been made between them. No question except as to the statute was suggested in the Petition for Appeal (R 6).

If we believed that any question were before this Court as to the reasonableness of the order, insofar as it allows grocers to make cash-and-carry sales only one cent below the price for doorstep delivery, we could find plenty of material to justify it (Report, 238, 246, etc.). We could show that this differential merely recognized the prevailing practice in Rochester, New York City, and most other cities in New York State; that it has given general satisfaction to grocers, particularly as the federal policy expressed in several milk marketing agreements, and the policy under the

Ohio Milk Distribution Law, has been to require the grocer to sell at the delivered price; and that there is a considerable body of trade and consumer opinion supporting this differential.

We believe there is no such question here. It was not raised below in accordance with correct appellate practice, and neither was it raised in the manner provided for in the statute in question.. See ch. 158 of N. Y. Laws of 1933, hereinafter called the Milk Control Law, made an appendix to appellant's brief, §312 (f). This provides that the Milk Control Board shall give a public hearing upon reasonable notice before "making, revising or amending any order fixing the price to be paid or charged for milk", and that:

> "Such order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order."

If appellant did not like the one cent differential provision of Order Number Five he should have pursued the remedy provided under the statute. *Collins v. Texas*, 223 U. S. 288; *Gorham Mfg. Co. v. Tax Comm.*, 266 U. S. 265. This action would not have estopped him from challenging both the statute and an adverse order under it. *Buck v. Kuykendall*, 267 U. S. 307.

## Parts of the Statute Directly Involved.

The constitutional question presented is limited by the facts of the case to the constitutionality of fixing minimum prices at which milk can be sold to consumers. Other provisions of the statute, such as those for

licensing milk dealers and holding them to certain standards of conduct (§308), and the provision authorizing the establishment of minimum prices on sales from producers to dealers (§312-d), and the provision authorizing maximum prices on sales to consumers (§312-a, b), depend upon somewhat different considerations as to the public welfare, which will not be argued now.

That the other provisions of the statute are separable from the minimum-price-to-the-consumer provision now involved is indicated by various circumstances. Section 316 of the statute is the common provision that invalidity of one provision shall not invalidate the whole statute. This at least encourages the idea of separability. *Champlin Rfg. Co. v. Commission,* 286 U. S. 210, 235. The Report of the Pitcher Committee (N. Y. Legis. Doc. No. 114 of 1933, hereinafter referred to as "Report" followed by page number) at page 17 shows that fixing minimum prices to consumers was regarded merely as one of several possible remedies. See also the Report at page 18, title 7-d-3. The minimum-price-to-the-consumer provision was not in the bill as originally reported (S. Pr. No. 991) and was added by an amendment (S. Pr. No. 1896). The practical ineffectiveness of construing this provision as mandatory is such that we believe the courts of New York State will not so construe it, notwithstanding its apparent choices between "shall" and "may". *(Matter of Rutledge,* 162 N. Y. 31; *People v. Karr,* 240 N. Y. 348.) Nobody has suggested that the Board is compelled to establish minimum prices, and it has established none for small communities.

The other provisions of the statute will need to be studied to learn the place in the general statutory plan held by the minimum-price-to-the-consumer provision, and hence its justification and significance, but the provisions which now are directly involved are the following:

§312. *Order fixing price of milk.* (a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers except for consumption on the premises where sold.

4. When, pursuant to statute, regulations adopted thereunder, or ordinance, various grades of milk are specified, the board shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable.

(c) It is the intent of the legislature that the public emergency requires that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers.

* * * *

(e) After the board shall have fixed prices to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

## Legislative Findings of Fact.

This 1933 statute received a great deal of attention from the Legislature during the eight weeks it was pending, and before that the entire matter had been carefully investigated and considered by a special legislative committee. This committee, which became known as the Pitcher Committee from the name of its chairman, acted under a joint resolution of March 10, 1932, which instructed it:

"* * * to investigate the causes of the decline of the price of milk to producers and the resultant

effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State * * *'' (Report, 9).

The Report, copies of which will be submitted to the Court, vouches for the intelligence, thoroughness and sincerity with which the Committee conducted its investigation. A preliminary report, consisting of the ''Conclusions and Recommendations'' (see Report, 13-23) and some other material, was filed February 13, 1933, and printed as N. Y. Legis. Doc. No. 59 of 1933. The final report in mimeographed form was available somewhat later, and is now in print consisting of 473 pages. It is probably the most thorough and best organized report ever presented of the actual functioning of a great milk market. The following findings are main headings among its Conclusions and Recommendations:

''1. The production and distribution of milk in this state is a paramount industry and affects in a large measure the health and prosperity of the people of the state. It is the duty of the state to take such measures as are necessary and reasonable to preserve this vital industry.''

''2. The financial situation of dairy farmers in the state is desperate and has grown increasingly critical during the period of the Committee's investigation.''

''3. The principal causes of the extremely low prices paid to producers for milk are: The unprecedented decline in the general level of prices; a periodic increase in the number of cows and in milk production; the prevalence of unfair and destructive trade practices in the distribution of milk leading to a demoralization of prices in the metropolitan area and other markets and the failure of charges for transportation and distribution to be reduced

in proportion to the reduction in retail prices of milk and cream."

"4. The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control."

"5. Among the remedies which might be applied to mitigate the evil of price-cutting are: Universal application of the classified price plan with uniform prices to all milk dealers for milk utilized in each classification; the fixing of minimum prices to be charged by milk dealers for milk and cream sold to consumers and other customers; the imposition of a graduated tax to be paid by milk dealers on their sales of milk and cream in excess of the normal or average proportion of the milk supply of the entire milk shed which is sold by the dealers in fluid form."

"6. Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization appears to offer the best prospect for permanent stabilization of the dairy industry in the New York milk shed."

"7. As an emergency measure, a temporary milk control board should be created, with broad powers to regulate and stabilize the milk industry as well as may be done under the circumstances. This board should also foster and promote the more complete organization of the producers as outlined above."

Each one of those seven conclusions is supported by subheadings indicating the reasoning and data which justify it. The remainder of the printed Report is a careful analysis of the evidence (2350 typewritten pages besides the exhibits) which was before the Pitcher Committee. This leads up to the Bill (Report, 367-379) which became the statute now involved. The opening section of that statute is as follows:

"§300. *Legislative finding; statement of policy.* This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination."

## Evidence Supporting the Findings

For present purposes a legislative finding is not unlike the verdict of a jury. It is entitled to respect, and will stand if it is bottomed upon evidence and not clearly against the weight of it.

We submit that the New York Legislature was justified in enacting the particular statutory provision now involved, the minimum-price-to-the-consumer provision, if it had before it evidence which established the probability of three things. *First,* that a serious condition existed affecting the production and distribution of milk, and amounting to a public emergency. *Second,* that the milk business is affected by conditions peculiar to itself so that it could not be cured by operation of the law of supply and demand. *Third,* that price-cutting in the sale of milk from stores to consumers was a substantial contributing factor to the serious situation in the milk business.

### (a) *Evidence of an emergency.*

The simple fact was that the price paid New York State farmers in the spring of 1933, for milk produced under the exacting health standards of the present day, was the lowest price since 1896. From March 1929 to March 1933 the producers' price for fluid milk was reduced 61 per cent (Report, 15, 41, 44, 96). A dairy farmer, particularly one who was in debt, or who had any sort of fixed costs, was helpless. A vital fact in the dairy industry, well known to everyone, was stated by a witness as follows (Report, 61):

> "The factory, when it begins to run in the red, shuts down or shuts down partially, but the farm cannot do that. The cows continue to produce milk, and something must be done with that milk, even if it is not bringing in any income."

Foreclosures and tax sales became common in every dairy community (Report 61-70). The past history of the dairy industry in New York State and elsewhere showed that such conditions were liable to cause a milk strike. There had been such strikes in New York State in 1883, 1916 and 1919 (Report, 100, 103). A progressive dairyman in western New York summed up the situation as follows (Report, 66):

> "The so-called marginal man is in despair, and the margin is drawing nearer and nearer to the center every day."

A very respectable and conservative dairyman from northern New York said that a violent strike was imminent (Report, 75). His forecast was realized by a strike in the Rochester area in March 1933 which cost the lives of two persons, a trooper and a striker, and the destruction of much property. A more widespread and equally violent strike occurred in New York State in early August 1933. See Message from Governor Lehman to the Legislature, August 4, 43 State Dept. Rep. 530. Before that strike cleared the air, powerfully aided by the fact that the benefits of the Milk Control Law were becoming generally apparent, strike threats were continuous. The distinguished editor of the New Outlook, in an editorial for June, 1933, said:

> "The milk producers are one of the most harassed and desperate groups of farmers in the country."

Similar conditions prevailed in all of the principal dairy states. See, "Milk—The Problem on your

Doorstep," by John Dreier and Kendall Foss, page 37 of New Outlook for October, 1933.

The Report did not overstate the situation presented to the New York Legislature last April when it said (page 11):

> "The very inadequate price for milk is resulting in a desperate situation among many farm families. * * *. Returns to producers of milk much below the cost of production eventually must lead to a reduced supply of milk which meets the accepted standards for consumption in the cities of the state. An immediate danger is the interruption of the milk supply by strikes and violence. Recent and present happenings in the Rochester milk shed and evidence received by this Committee indicate that the danger is immediate, the necessity urgent and such as will not admit of delay in public supervision and control."

(b) *Evidence that because of peculiar conditions in the milk industry the emergency would not be self-curative.*

All during 1932 the price paid New York State farmers for milk was less than the cost of production (Report, 46-60, 14). This had no appreciable immediate effect upon the quantity produced (Report, 85, 86). Its only immediate effect was to render it difficult to enforce sanitary standards of production (Report, 70-74). Its effect for reducing production will be experienced most fully about seven years hence and it probably will be exaggerated beyond any proper relation to present needs or needs of that time. This is because dairying is a biological industry, requiring several years for adjustments of increase or decrease, which causes such adjustments to be delayed and violent. This

phenomenon is commonly referred to as the "dairy cow cycle" (Report, 16, 39, 60, 68-69, 73, 76-77).

Consumption of milk is as unresponsive to price as is supply. A hot day may increase consumption, but the customary price continues; conversely cheap milk does not stimulate consumption to any great extent (Report, 38, 39). The report of the Ten Eyck Committee in 1927 (see Report, 139) studied the effect of price changes on demand for milk in New York City from 1919 to 1924, and found that during that period Grade B quarts had been reduced one cent on 11 different occasions, but the net increase in consumption measured five weeks after each change averaged only six-tenths of one per cent. Similar experience was noted as to Grade A quarts and Grade B bulk and a more favorable experience (1.7 percent increase) as to Grade B pints.

The "classified price plan", by which more than half of New York State milk has been purchased since 1920, and which affects the prices paid for the balance (Report, 109-113, 160), is another factor which interferes with any tendency of prices to regulate production. Milk used for fluid purposes is paid for at a greater price than milk used for manufacturing purposes. The latter is usually called "surplus" milk and some of this is necessary to service the market. The price that a farmer receives may depend more upon his success in marketing a greater percentage of his production in the fluid class than upon the volume of surplus produced (Report, 159, 160). Even though increased surplus affects adversely the price for milk to producers as a class, each individual producer may

hope to escape its effect and many will succeed (Report, 16). This same point is made in "A Lesson from the Milk Industry," printed in the National City Bank bulletin or letter for January, 1933, page 14.

The introduction of long term credit into any business makes it more difficult to effect adjustments between production and demand. Dairying has its fair share of that problem. The total indebtedness of $160,000,000 on New York State dairy farms was mostly contracted before 1931 (Report, 13, 31). That was much less than a year's income from dairying in 1929, much more than the income in 1931 (Report, 29), and probably almost double the income for 1932. Taxes are another fixed charge which make it difficult for the farmer to respond to a lowered price of milk by reducing production (Report, 31-32). Real property is the largest element of dairy farm capital (Report, 31) and real property is under pressure from taxes whether or not it is in use for production.

The tendency of the milk distribution business to monopoly is another reason why the interrelation of consumer demand and producer supply sometimes cannot be trusted to work out a satisfactory price relationship. There is no city in New York State where any one company has a monopoly or near-monopoly of the milk business, but the tendency has been for the number of distributors to decrease and a few companies to emerge as the dominant factors in each market (Report, 165, 180).

In New York City three companies handle approximately two-thirds of the total milk supply, and this

condition is usual in other cities (Report, 165). A very large percentage of retail business in New York City is controlled by Borden's Farm Products Company and Sheffield Farms Company (Report, 166) and this is the situation to which the New York Times referred editorially in its issue of September 3, 1933, when it said "the tendency has been toward monopoly—or duopoly."

There has been some recent tendency to increase distributors, but "these conditions probably are temporary and the trend toward fewer and larger distributing units may be expected to continue with the return of more normal conditions in this industry" (Report, 167). Even among the smaller units in the industry there is a possibility that monopolistic tendencies will be realized through milk dealers associations (Report, 167-173). The larger units have tended to organize through holding companies on a national scale (Report, 173-179). In the past the milk industry in New York State has shown strong monopolistic tendencies (Report, 100-101, 299; *People v. Milk Exchange*, 145 N. Y. 267.)

The situation as to monopolistic tendencies is summarized in the Report, page 20, as follows:

> "At present competition in the business of milk distribution in most cities of the state is keen to the point of being wasteful and destructive. On the other hand, there has been over a period of years a marked tendency toward fewer and larger distributors. This tendency, though temporarily interrupted by unusual conditions, may be expected to continue when conditions are again stabilized."
>
> "Milk dealers in most cities have learned to cooperate to a certain extent for the solution of mu-

tual problems * * * The power resulting from such concerted action, if abused, could readily be subversive of the public interest."

"In the past ten years large corporations have developed, embracing numerous subsidiary companies engaged in the handling and distribution of dairy products. The two largest of these corporations, having vast resources and widely scattered operations, play an important part in the handling of milk produced in this state."

Milk distribution is an industry of decreasing costs to an extent which makes it a natural monopoly of organization. (For discussion of this terminology, see Patterson & Scholz, "Economic Problems of Modern Life", page 169. See also Sumner H. Slichter, "Modern Economic Society", 317-324.) It has heavy fixed expenses (Report, 21, 32, 164) with the possibility of greatly cutting down operating expenses per unit by doing a large volume business (Report, 301-303, relative to Rochester, and 324, as to comparison between Ottawa and Toronto). Dr. Leland Spencer, in a mimeographed report to the N. Y. S. Milk Control Board under date of October 17, 1933, as to "Milk Distributors' Costs and Profits", concludes from statistical material obtained by a recent survey:

"In general the largest distributors are the ones which would survive longest under unfavorable conditions. This is evidenced by the fact that while 22 of the 30 New York distributors reported losses in the 3-months period of 1933, only one of the five largest companies failed to make any profit. Also while nine of the 22 distributors in the larger upstate cities reported losses for the same period, none of these were among the five largest companies. The companies whose figures are included in these summaries are for the most part the largest in the several markets. They have

> the important advantage of large volume operations and the opportunity to employ skilled management. Ordinarily these companies would show lower costs and larger profits than the average for the entire industry."

Other factors peculiar to the fluid milk industry are referred to in the Report of the Pitcher Committee (pages 15, 16) and some not mentioned there are part of common knowledge. Producers are not merely unorganized but are split into bitterly hostile groups; milk is mostly delivered without an agreed price and paid for a month or two later so that the buyer is really a selling agent free from fiduciary obligation; many producers go unpaid (Report, 362). The New York Legislature had justification for concluding that the dairy emergency presented to it in April 1933 would not be self-curative and called for special methods of control. It did so conclude, not only by its Conclusion number 4 (previously quoted) but also by the following (Report, 15, 18):

> "Unsettled market conditions have led to price wars among distributors which have caused reductions in retail and wholesale prices below the point justified by the supply and demand situation. Unfair and destructive trade practices have been more violent and more serious than usual in their effect upon the price structure."
>
> "It is clear that in these abnormal times the economic law of supply and demand cannot be relied upon either to insure the consumers of a continuous and adequate supply of pure and wholesome milk, or to prevent grave injury to this important industry and its possible disintegration."

*(c) Evidence that price-cutting in sales from stores to consumers was a serious factor.*

The Report concluded that the fixing of minimum prices to be charged by milk dealers for milk and cream sold to consumers and other customers was a remedy which might be applied to mitigate the evil of price-cutting, but would strike directly at the evil without removing its cause (Report, 17). To understand why it regarded this as a measure for relieving an emergency as to producer prices, some knowledge of the actual functioning of the milk distribution business is necessary. The following are direct quotations from the Report (pages 95-97):

> "The most definite information which the Committee received on the subject of price-cutting by dealers is that supplied by a survey of the purchases and sales of milk by retail stores in New York City. This information is reported in a later section (page 239). It shows a wide variation in the prices at which milk is sold to the stores and in their retail price to consumers.
>
> "Evidence of the effect of price-cutting is found in the reduced premium paid for fluid milk over its butter value, by dealers purchasing their milk on the classified price plan (table 34). The average premium paid for milk sold in fluid form during the 5-year period 1927-1931 was $1.53 per 100 pounds. In 1932 this premium averaged only $1.06 per 100 pounds and for March 1933 it is reduced to $.68.
>
> "The principal cause of the reduced premium for fluid milk is price-cutting on the part of dealers who share little or none of the burden of surplus milk. Their practice is to purchase milk at approximately the same price which the Sheffield Farms Company pays for all milk including a large percentage of surplus. In effect, therefore, the dealer without surplus obtains his fluid milk

at a much lower cost than those dealers who handle surplus milk or who buy on the basis of a classified price and pay a premium for the milk which they sell for consumption in fluid form. During 1932 the Sheffield price for all milk including surplus was $1.30 per 100 pounds. The average price which Borden's Farms Products Company and other League buyers paid for fluid milk not including surplus was $1.77 per 100 pounds. This difference of $.47 per 100 pounds is the competitive advantage enjoyed by a dealer having no surplus, a condition which is typical of the great majority of the smaller dealers selling milk in New York City.

"This competitive advantage on the part of dealers having little or no surplus milk is generally dissipated in price concessions to customers as shown by the results of the store survey in New York City. The opportunity for price-cutting from this cause varies with the spread between the retail price in the city and the prices returned to farmers by the Dairymen's League and the Sheffield Farms Company. This spread in turn is determined to a large extent by the amount of surplus milk in the milk shed. When the surplus is small, the price received by farmers approaches the price which the larger dealers pay for fluid milk. When the surplus is large, there is a wider spread between the fluid milk price and the blended price returned to farmers. At such times the dealer handling only fluid milk has the greatest advantage and price-cutting is most rampant. The only way in which the Dairymen's League and the Sheffield Farms Company can protect their trade outlets under such conditions is to reduce the spread between the retail price and the value of surplus milk. That is the condition which has prevailed in the past year or longer and which accounts for the small premium over butter value which is paid for fluid milk."

The following are direct quotations from the material about store sales in New York City, referred to

at the beginning of the above quotation (Report, 246-257):

> "It has been stated on numerous occasions in the past year that the sale of milk at low prices by retail stores was a disturbing factor, tending to force the price of all milk to a lower level. Loose milk has been sold out of stores in New York during the past few years at prices ranging as much as five cents or more per quart below the price of Grade B bottled milk on retail milk routes. Prior to 1932, however, the price of bottled milk at stores was held rather closely in line with the prices on the routes."
>
> * * * *
>
> "Some striking changes are noted in the selling prices of Grade B bottled milk (table 98). At the time of the 1931 survey more than 70 per cent of the stores were selling at the established price on retail routes. In 1932 less than 10 per cent of the stores were getting as much as the retail price on routes, 42 per cent were selling at a discount of one cent, 25 per cent at a discount of two cents, and 20 per cent at a discount of three cents from the route price. The greatest disparity between store prices and route prices was found in Brooklyn and Queens where more than half the stores were selling at a discount of three cents or more per quart from the route price."
>
> * * * *
>
> "Many charges and counter charges have been made during the past year in respect to the responsibility for price-cutting in the sale of milk to stores in New York City. It is common knowledge that the two large companies make relatively fewer concessions from established sales prices than do the smaller distributors. The principal reason for this difference is that their milk is sold under well known brands or trade names which have come to signify extra value in quality and service. Stores find it to their advantage to carry these brands of milk because they are so often called for by the customers. Another reason may

be that these larger companies are interested primarily in retail distribution and do not care to take on more wholesale business unless it will pay its way. * * *"

"Strangely enough, the price concessions apparently are made quite as often to the stores handling a small volume, as to the larger stores. The average sales per store were lower in the group receiving price concessions than the general average for all the stores (table 105 and table 89). Where individual cases are examined, it becomes apparent that some of the smallest stores obtained concessions as readily as the larger ones (tables 106, 107 and 108)."

It is respectfully submitted that the New York Legislature was justified in concluding that there is an actual relationship between a few cents cut in price upon a sale of milk from a city grocer to a consumer and the dairying counties of the State plunged into distress. Admittedly this legislative provision was directed to a symptom, and the Legislature did not regard this measure as a cure, but it was an important item in the treatment prescribed.

## Similar Laws in Other States.

The ills of New York State are not imaginary or peculiar to its people, and it involves a considerable responsibility to say that the remedy prescribed by this law is unreasonable. Other States are experiencing the same ills, and are attempting the same remedy.

The Province of *Manitoba*, Canada, by its Public Utilities Board, has been regulating the price of milk, including minimum prices by dealers and stores to consumers since September 1932 without litigation.

The Province of *Alberta* in March, 1933, following an inquiry into milk distribution in 1932, amended its Public Utilities Act to regulate prices of milk and other farm products under certain conditions. We have no information as to what action has been taken under that amendment.

The Province of *Quebec* and also the Parliament of *Canada* have been studying the problem of milk regulation during the past year. See "Milk", by A. L. Oakhurst, in XIII Canadian Forum (July 1933) page 368.

In *England,* on January 27, 1933, the Reorganization Commission for Milk filed a printed report of 228 pages. It recommended price regulation under authority of the Agricultural Marketing Act, and we are informed that such regulation is now effective.

*Wisconsin* commenced in December, 1932, to fix prices of milk sold in Milwaukee, and has conferred more explicit power upon its Department of Agriculture by ch. 64 of the Laws of 1933. Under that authority price regulations have been continued for Milwaukee and recently initiated for Madison, in each case including minimum prices for sales from stores to consumers. This law declares the existence of a public emergency and provides that, "all increases in retail prices shall go to the producer." In the case of *Gladstone Dairy v. Hill,* decided by the Circuit Court of Dane County on June 27, 1933, constitutionality of that law was sustained. A long opinion was written by Judge A. G. Zimmerman, which is printed in the Wisconsin State Government Service Journal

for July 15, 1933. For an account covering the last twelve months see "Regulation of Milk Marketing in Wisconsin", IX Journal of Land & Public Utility Economics (August 1933) page 317.

*New Jersey* has enacted a law which is a very close copy of the New York statute. This is ch. 169, N. J. Laws of 1933, signed May 21. Orders have been issued under it fixing minimum prices at which milk and cream can be sold, including sales from stores to consumers. The recital which introduces this law refers to the distress of farmers producing milk for consumption in New Jersey, mentions that such distresses in various other communities have resulted in milk dumping and riots, in some cases to such an extent that the public has been denied a sufficient supply of good wholesome milk, and concludes that the act is an emergency law, "necessary for the immediate preservation of the public peace, health and safety." The duration of the law is until July 1, 1935.

*Connecticut* enacted in May, 1933, as ch. 226, an act creating a Board of Milk Control, with power to fix minimum prices for milk and cream, including sales from stores to consumers. That power has been exercised by several orders. On August 2, 1933, in the case of *Diorio v. Morris* the Superior Court of New Haven County refused to hold the law unconstitutional. An opinion of a few pages was written by Judge Arthur F. Ells, relying principally upon *People v. Nebbia.*

*Florida* on June 12, 1933, enacted a law which is a close copy of the New York statute, but apparently has

used it none or little. A letter from the Attorney General of Florida indicates that the law was held unconstitutional by a court of original jurisdiction.

*Ohio* on June 22, 1933, enacted an extensive Milk Distribution Law, H. B. No. 671. The case of *State ex rel. Bricker v. Kroger Grocery and Baking Co.*, now pending before the Supreme Court of Ohio, apparently is an original proceeding of *quo warranto*, brought by the Attorney General of Ohio because a large chain store insisted upon selling milk cash-and-carry at one cent a quart under the delivered price.

*Vermont* on July 19, 1933, enacted a law to control the distribution and sale of milk, with power to the Milk Control Board to license dealers, fix prices to be paid producers and maximum and minimum prices for wholesale and retail sale. It has been applied in at least one large market.

*Pennsylvania* several months ago named a legislative committee to study the milk situation, and at the present session (November 1933) is considering enactment of a milk control law.

The *United States* included "milk and its products" among the seven basic agricultural commodities regulated under the Agricultural Adjustment Act of May 12, 1933. Under §8 the Secretary of Agriculture is authorized to enter into marketing agreements with persons engaged in "handling in the current of interstate or foreign commerce" any agricultural commodity, and to require licenses from all such persons. Under that authority milk marketing agreements have been entered into fixing buying and selling prices in

Chicago, Boston, Philadelphia and many other areas. The Chicago milk agreement has been upheld in the Supreme Court of the District of Columbia. (*Economy Dairy Company, Inc. v. Wallace;* Aug. 29, 1933; 41 Wash. Law Rep. 633; *Milton-Beck v. Wallace,* Aug. 29, 1933; 41 Wash. Law Rep. 833.) So has the Philadelphia milk agreement. (*Capital City Milk Producers v. Wallace,* Nov. 15, 1933.) Each of those opinions was by Mr. Justice O'Donoghue. A peach marketing agreement under the same Act was sustained by Judge Adolphus F. St. Sure, in U. S. District Court at San Francisco. (*United States v. Calistan Packers, Inc.,* Oct. 2, 1933.)

Such a common tendency in legislation is by no means conclusive as to its constitutionality, but neither is it insignificant. "Legislation so general marks a rising tide of opinion which is suggestive and informing." Judge Cardozo, in *Roman v. Lobe,* 243 N. Y. 51, 55.) Such a common tendency indicates at least that the legislation is responsive to "the felt necessities of the time" which "have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (O. W. Holmes, Jr., "The Common Law," page 1.)

> "Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. * * * An historical justification of liberty of contract between landlord and tenant is not a demonstration that the system must survive every exigency. When it temporarily ceases to be adapted to the demands of the present it may be modified, if the best interests of society are thereby waived. 'An earnest conflict of serious opinion' may arise as to whether

such interests have been wisely served or whether the legislation is anything more than another example of misdirected zeal in dealing with a crisis. But that argument does not address itself to the court. 'The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*.' * * * The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law." (*People ex rel. Durham R. Corp. v. La Fetra*, 230 N. Y. 429, 446, 447, 450.)

## The Usefulness of the New York Milk Control Law Has Been Demonstrated.

Governor Lehman signed the law on April 10, 1933. On April 12 he named a Director of Milk Control, thus completing the triumvirate Board. The Board held its first public hearing on April 13, and on April 14 it made Order Number Five (R 2) now involved, which became effective on April 17. That order, and the concurrent order for the Metropolitan Area, did not purport to raise prices. Although they had the effect of raising prices for some of the smaller cities and villages (and were below the existing prices in some others) they merely put into uniform effect the prices which were then the generally declared and recognized prices in all the larger cities of the State.

Those orders, merely stabilizing prices, unquestionably were beneficial to producers, and prevented the usual sharp decline of prices from March to April and from April to May. Effective May 16 the Board

established a price to be paid producers and advanced the price of milk in New York City a cent a quart. Effective July 21 the Board advanced the price of milk in all the larger cities one cent, making the price for Grade B sold out of a New York City store 11 cents (or 10 for an "unadvertised" brand) and 10 cents in the upstate cities. Delivered prices are 12 and 11 respectively, which is merely the price relationship which prevailed during nearly all of 1932, and considerably below the price for previous years. (Report, 181.) Apparently no consumer distress has resulted, and the consumption of milk has not been reduced appreciably. The New York Times in an editorial of Aug. 24 commented on the fact that only three "consumers" attended the public hearing next after the increase of July 21, and they were present to talk upon another matter.

Meanwhile milk prices to producers have increased about 80% above last spring, and about 30% above prices a year ago when milk retailed at the present price. The Dairy Farm Report for November, 1933, issued by U. S. Dept. of Agriculture in cooperation with N. Y. S. Dept. of Agriculture and Markets, gives the following as average prices actually received by New York State farmers per hundredweight of milk:

| | Jan. | Feb. | Mar. | Apr. | May | June | July | Aug. | Sept. | Oct. | Nov. | Dec. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1931 | 2.25 | 2.22 | 1.97 | 1.75 | 1.58 | 1.49 | 1.66 | 1.81 | 1.92 | 1.95 | 1.90 | 1.62 |
| 1932 | 1.61 | 1.58 | 1.48 | 1.30 | 1.16 | 1.07 | 1.10 | 1.22 | 1.30 | 1.34 | 1.40 | 1.29 |
| 1933 | 1.17 | 1.12 | 1.01 | .99 | 1.18 | 1.37 | 1.55 | 1.79 | 1.77 | | | |

There has been no change in production or consumption sufficient to have any appreciable effect upon those prices. The price of butter has been slightly higher in 1933 than in 1932 but such increase is a very small factor in the above prices.

A computation has been widely published to the effect that the income of New York State dairymen for the five months, May to September inclusive, was $9,000,000 more in 1933 than in 1932, entirely as a result of activities by the Milk Control Board. See the United States News for November 18, page 12, and other publications of about that date. Other computations apparently on a conservative basis run as high as $16,000,000.

Governor Lehman, in his message to the Legislature on August 4, 1933, said: "As a result of the creation of the board the average price for milk products which the dairy farmers are now receiving is very substantially in excess of that previously ruling." 43 State Dept. Rep. 530, 531.

The essential fact that this law has been beneficial is common knowledge in New York State. Even in a constitutional litigation it is permissible, we hope, to mention the fact with some satisfaction, and with the belief that it reflects the care and thoughtfulness that went into the statute. Had the statute produced widespread distress we can be sure that fact would be adduced against it.

## Summary of Argument.

POINT I. The necessity for any particular exercise of the police power is a matter to be determined in the first instance by the legislature. In the present case such a legislative determination has been made and no reason appears why it should be disturbed.

POINT II. The distribution of milk is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility.

POINT III. Fixing minimum prices to consumers is a common form of utility regulation.

POINT IV. The power to fix minimum prices to consumers is an important and desirable feature of the Milk Control Law. It has an actual relation to the public interest and should be sustained.

POINT V. The statute is constitutional and the judgment of conviction should be affirmed.

## POINT I.

**The necessity for any particular exercise of the police power is a matter to be determined in the first instance by the legislature. In the present case such a legislative determination has been made and no reason appears why it should be disturbed.**

That the period 1930-1933 has brought this nation and every part of it some unprecedented problems is of course known to the Supreme Court of the United States. An opinion by the Chief Justice delivered on January 4, 1932, quoted an official report that "a depression such as the country is now passing through is a new experience in the present generation", and said that it was a matter of which the Court took judicial notice. "It is the outstanding contemporary fact, dominating thought and action throughout the coun-

try." (*Atchison etc. Ry. Co. v. U. S.*, 284 U. S. 248, 260). At the same term Mr. Justice Brandeis said, "The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions." (*New State Ice Co. v. Liebmann*, 285 U. S. 262, 306).

There have been some developments since then, not all of a reassuring nature. The case of *Home Building & Loan Assn. v. Blaisdell*, No. 370 on the present calendar of this Court, on appeal from the decision reported in 249 N. W. at 334, is representative of a considerable number of recent statutes and decisions trying to do rough justice between debtor and creditor in a state of chaos, and representative of the period.

That agriculture has more than its share of the current troubles cannot be unknown. See "Legal Planning for Agriculture," by Farnsworth L. Jennings and Robert C. Sullivan, 42 Yale Law Journal (April 1933) 878; "Federal Farm Legislation: A Factual Appraisal," by Paul J. Kern, 33 Columbia Law Review (June 1933) 984.

The foregoing refers to the generalities of the present period. We need ask no benefit by inference from them in dealing with the specific problem now before the Court, because we present proof directed to the need for this specific statutory provision.

The Milk Control Law was designed and enacted for the purpose of regulating the price of milk in the State of New York temporarily and during a serious emergency. After a long and exhaustive investigation and study of conditions in the milk industry in the State the Legislature found and determined that such an emergency existed. It is within the power of the Legislature to make this finding a fact, which is at least highly persuasive.

> "Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the legislature. That it existed, promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation." (*People ex rel. Durham R. Corp. v. La Fetra*, 230 N. Y. 429, 440.)

> "While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and the market value is the reasonable value; * * * yet the legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds because it is unprofitable to build; that those who own seek the utmost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become general. It is with this condition and not with economic theory that the state has to deal in the existing emergency." (*Ibid.*, pages 443-444.)

> "Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and

advantage in the face of the extraordinary and unforeseen public exigency, which the legislature has, on sufficient evidence, found to exist." (*Ibid.*, Page 451.)

"No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts. (Citations omitted.) But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world." (*Block v. Hirsch*, 256 U. S. 135, 154.)

"Whether the manufacturer of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which

> the legislature has to promote the general welfare is very great and the discretion which that department of the government has, in the employment of means to that end, is very large." *(Powell v. Pennsylvania,* 127 U. S. 678, 685.)
>
> "When the bill was pending in Congress the Judiciary Committee of the House of Representatives held an extended public hearing, in which it received testimony, among other things, on the question whether beer and other intoxicating malt liquors possessed any substantial medicinal qualities. On the information thus received the Committee recommended the passage of the bill. * * * We find, on the whole, no ground for disturbing the determination of Congress on the question of fact as to reasonable necessity, in the enforcement of the 18th Amendment, of prohibiting prescriptions of intoxicating malt liquors for medicinal purposes." *(James Everard's Breweries v. Day,* 265 U. S. 545, 561, 563.)

See also *Chicago Board of Trade v. Olsen,* 262 U. S. 1, 10-15, 37-38.

It being accepted as a fact that a public emergency exists, and that the legislation is of a temporary nature, greater latitude than usual is permissible. This proposition received illustration in the case of *Wilson v. New,* 243 U. S. 332, sustaining the power of Congress to fix the standard of minimum wages for railroad employees during an emergency. That case was relied upon to support the emergency rent laws in *Block v. Hirsch,* 256 U. S. 135, 157, where the law was limited to two years, and it was said:

> "The regulation is put and justified only as a temporary measure. (Citations omitted.) A limited time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

In *Levy Leasing Co. v. Siegel,* 258 U. S. 242, 245, relative to those same rent laws, this Court said:

> "In terms the acts involved are 'emergency' statutes and, designed as they were by the legislature to promote the health, morality, comfort and peace of the people of the State, they are obviously a resort to the police power to promote the public welfare. They are a consistent inter-related group of acts essential to accomplish their professed purposes.
>
> "The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power."

The case of *Wilson v. New* was relied upon to support the same proposition in *People ex rel. Durham R. Corp. v. La Fetra,* 230 N. Y. 429, 445. Several times in that opinion the temporary character (for two years) of the rent laws was stressed. Thus, at page 449:

> "The State in an emergency caused by flood or fire, when multitudes are homeless, might concededly compel owners of houses to take in undesired occupants in order to shelter them from exposure to storm and cold. Why then would the State have no power reasonably to regulate for a time the terms upon which a landlord under such conditions

might put his tenants out when they promptly pay a reasonable compensation for the use of the property?"

The temporary and emergent character of the legislation being accepted, it is well within the scope of the police power.

"The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirements of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the State has surrendered one of the attributes of sovereignty for which governments are founded, and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare." *(People ex rel. Durham R. Corp. v. La Fetra,* 230 N. Y. 429, 443.)

"The police power is 'the least limitable of the powers of government.' (*District of Columbia v. Brooke,* 214 U. S. 138, 149.) It extends to all the great public needs. *(Camfield v. United States,* 167 U. S. 518.) The validity of police regulations must depend on the circumstances of each case and the character of the regulation whether arbitrary or reasonable. A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection." *(People v. Perretta,* 253 N. Y. 305, 309.)

See also, *Barbier v. Connolly,* 113 U. S. 27; *Manigault v. Springs,* 199 U. S. 473, 480; *C. B. & Q. R. Co. v. Illinois,* 200 U. S. 561, 592; *Noble State Bank v. Haskell,* 219 U. S. 104; *Eubank v. Richmond,* 226 U. S. 137, 142-143; *Atlantic Coast Line R. R. Co. v. Goldsboro,*

232 U. S. 548, 558; *Sligh v. Kirkwood*, 237 U. S. 52, 59; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 548; *Miller v. Schoene*, 276 U. S. 272, 279-280; *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 254, 260-262; *United States v. Macintosh*, 283 U. S. 605, 622.

## POINT II.

**The distribution of milk is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility.**

The appellant presents one argument only, that the due process clause of the Constitution guarantees him the right to sell milk at a price of his own choosing, irrespective of the public need to the contrary amounting to an emergency. A State Board, authorized by the Legislature, has determined that a different price than Nebbia chooses is more in the public interest under present conditions. For the purpose of this judicial test of the appellant's proposition it is to be assumed that the Board is right. The appellant's position still is that it is the constitutional right of every tradesman, at all times and under all conditions, to fix the price for his commodities. This, he says, is a supreme good which cannot be set aside even upon the clearest demonstration that a temporary exigency calls for different treatment.

Undoubtedly self-regulation of business through free competition is a good worthy of considerable sacrifice, but it is not always the preponderant value.

*(Stephenson v. Binford,* 287 U. S. 251, 274.) It has been said that the Constitution is not "the partisan of a particular set of ethical or economical opinions." (Mr. Justice Holmes in *Otis v. Parker,* 187 U. S. 606, 609.) "We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power." *(Noble State Bank v. Haskell,* 219 U. S. 104, 110.) And no matter how great a value is set on free competition, some care must be taken not to strive for "a mere delusive liberty." "Realities must dominate the judgment," and this means that in a specific case it is necessary to consider the economic conditions peculiar to the industry, the practices which have obtained and other matters practically affecting the public interest. *(Appalachian Coals, Inc. v. U. S.,* 288 U. S. 344, 360-361.) Public utilities are businesses in which free competition works out badly, and accordingly they are controlled upon a different principle.

The factual material which is supposed to justify the application to the milk business of some of the forms of regulation ordinarily applied to a public utility already has been referred to in this brief, pages 8-21. The legal argument will be rested upon the brief of James T. Cross, Counsel to the Pitcher Committee (Report, 271-294; substantially the same material is referred to in the opinion below, R. 18) and upon an article by Henry S. Manley, printed as an appendix to this brief.

The article concludes with a reference to three cases which, it is said, "will require careful study in connection with the proposal to make the gathering and distribution of milk and milk products a public utility."

One of those cases was *Fairmount Creamery Co. v. Minn.*, 274 U. S. 1. The Minnesota statute there involved evidently was intended to prevent unfair competition in cream buying, but no record was available before the Court as to how the competition operated or how the statute would curb it.

In the case of *Williams v. Standard Oil Co.*, 278 U. S. 235, only a feeble case seems to have been presented for making the wholesale and retail distribution of gasoline in Tennessee a public utility. It was shown that the commodity was essential and widely dealt in. Although the answer and brief made some showing of monopolistic tendency it could be deduced from the Governor's message, which resulted in the statute, that this was an afterthought. Obviously less investment is required to vend a non-perishable commodity to persons who call at service stations for it than is needed to vend a perishable food in smaller units from house to house. No health aspect and no producer interest were involved.

In the case of *New State Ice Co. v. Liebmann*, 285 U. S. 262, this Court decided that the business of manufacturing ice and selling it is essentially a private business and not so affected with a public interest that the Oklahoma legislature could limit the number of those who engage in it, in order to control competition. Reading the majority and dissenting opinions, four things are apparent:

(a) The majority felt that there was no justification for making ice manufacture and distribution a public utility, because, unlike cotton ginning, it was not "a paramount industry upon which the prosperity of the entire state in large measure depends." (pages 276-277.)

(b) The majority felt that the ice business "is not the case of a natural monopoly" (page 279) because, although in the past ice production may have required an expensive plant, nowadays refrigeration by electricity or gas is a common household process. (pages 277-278.) The minority opinion also accepted the "natural monopoly" test (see page 282) but said that, "In Oklahoma the mechanical household refrigerator is still an article of relative luxury." (page 290, see also 291-299.)

(c) Perhaps the majority would have sustained price-fixing as to ice, but it was unwilling to sustain a direct and arbitrary limitation upon those who could enter the business. This was the statutory provision "immediately in question here." (page 272.) "The question here is whether the business is so charged with a public use as to justify the particular restriction above stated." (page 273.) The majority felt that this provision was "against the interest of the consuming public" (page 278), and it did not appear that any other public interest existed as to the ice business.

(d) The discovery that the ice business was public in nature seems to have been peculiar to Oklahoma in 1925 and Arkansas in 1929. (page 283.)

Any one of those considerations may have been decisive.

For the four reasons suggested above we believe that *New State Ice Co. v. Liebmann* is not at all deci-

sive of the question whether the business of milk distribution in New York State may be regulated generally along the lines of a utility, but without direct regulation as to the number of persons entering the business.

The Legislature of New York State found the following facts relative to the milk industry:

> "Unsettled market conditions have led to price wars among distributors which have caused reductions in retail and wholesale prices below the point justified by the supply and demand situation. Unfair and destructive trade practices have been more prevalent and more serious than usual in their effect upon the price structure." (Report, 15.)

> "It is hereby declared that unhealthful, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this State, whereby the dairy industry in the State and the constant supply of pure milk to inhabitants of the State are imperiled. * * * That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing."

That quotation is from the legislative finding and statement of policy in section 300 of the statute. The enactment itself expresses the legislative judgment as to the appropriate remedy, but it seems to us it was accurately forecast in a sentence of the same section:

> "That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, stor-

age, distribution and sale of milk in the State of New York *is hereby declared to be a business affecting the public health and interest.*" (Italics ours.)

The conclusions of the appended law review article about making milk distribution a public utility may be summarized as follows:

1. "There can be no doubt about its being a common necessity, so that the public is dependent upon those engaged in the milk business. The vast amount of legislation and litigation which have been expended upon it speak eloquently of the public interest in milk. It is difficult to conceive of a more essential commodity, unless it be water, and a greater proportion of our citizens are dependent upon milk dealers than are dependent upon a public water supply. Besides that dependence of our consuming population upon the milk business, our agricultural population is as dependent upon the milk plant as the pioneer was upon the grist-mill, as the farmers of Illinois were and are upon the grain elevator, as the farmer of Missouri upon the stockyard, as the farmers of Kentucky upon the tobacco warehouse, and as the farmers of Oklahoma upon the cotton gin."

2. "The milk business operates in such a way as to attain its greatest efficiency as a monopoly, and has the tendency to become one."

3. "The use which the milk business makes of the public highways probably amounts to as much in quantity, even if it is somewhat different in nature, from the use by the motor busses, the private contract motor carriers, or the taxicabs."

4. "The possibilities for abuses which exist in the milk business are numerous, and have resulted in its commonly being required to have

> permits and licenses in connection with many of its instrumentalities. * * * The milk business from beginning to end is the most completely regulated business in existence, except the railroads. Making it a public utility may be a decided change in the form of regulation, but it need not be a startling change in its extent."

It is respectfully submitted that the considerations which were decisive as to the ice business of Oklahoma are none of them applicable to the business of milk distribution in New York state; that the legislative finding that the latter is "*a business affecting the public health and interest*" has abundant support; that it is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility.

## POINT III.

### Fixing minimum prices to consumers is a common form of utility regulation.

The public utility concept in this country traces back to *Munn v. Illinois*, 94 U. S. 113. In that opinion Chief Justice Waite leaned upon the case of *Mobile v. Yuille*, 3 Ala. 140, 36 Am. Dec. 441, as an American authority for price-fixing. That case involved an ordinance of Mobile which fixed the price and weight of bread. Apparently the price fixed was both a maximum and a minimum, and the ordinance also required bakers to be licensed and pay a fee. This ordinance was held constitutional by the Supreme Court of Alabama in 1841. After discussing various English authorities, the court said:

"The sum of these authorities is that though there can be no general restraint of trade, yet to a certain extent it may be regulated, and by consequence to some extent restrained in a particular place, if such restraint be for the good of the inhabitants, as when, for the prevention of nuisances, certain trades are confined to the suburbs of a city, or where it is for the advantage of the trade and improvement of the commodity.

"The regulation in this case seems to combine all these qualities. Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of utmost importance; and whatever doubts may have been thrown over the question by the theories of political economists, it would seem that experience has shown that this great end is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to the voluntary acts of individuals. By this means a constant supply is obtained without that fluctuation in quantity which would be the inevitable result of throwing the trade entirely open, and the consequent rise in price, when from accident or design a sufficient supply was not produced. The interest of the city in always having an abundant supply will be a sufficient guaranty against any abuse of the right to regulate the weight the consequence of which would be to drive the baker from the trade."

See also, *Guillotte v. New Orleans,* 12 La. Ann. 432, and *Slaughterhouse Cases,* 16 Wall. 36, which involved some similar legislation in Louisiana.

It is apparent that the Supreme Court of Alabama in 1841 correctly apprehended a principle of utility regulation not generally accepted for many years. In 1930 the Supreme Court of Montana had before it the

case of a gas company which insisted upon its alleged right to sell gas to consumers at a rate less than that fixed by the public service commission. (*Gr. Northern U. Co. v. Pub. Serv. Com'n*, 88 Mont. 180, 293 Pac. 294.) The court summarized progress in utility regulation as follows:

> "Legislation affecting public utilities, in its earlier stages, had as its chief purpose the prevention of exorbitant charges being made for the product furnished. As the field covered by these utilities broadened it became apparent that the public interest extended further than merely fixing of charges; that there was embraced as well the character of the service to be rendered, the kind of equipment employed; and that these things, and others, are so interdependent that one may not be intelligently regulated without control being exercised over the others. * * * Intermittent service is as costly, and at least equally detrimental to the public interest, as an exorbitant charge for the service."

Apparently the gas company was more successful in impressing its views upon a U. S. District Court of three judges, and the case came to this Court on appeal. (*Pub. Serv. Com'n v. Utilities Co.*, 289 U. S. 130.) This Court approved the position taken by the Montana court and reversed the District Court. The opinion noted that the gas company was claiming the "right to charge rates concededly less than reasonable rates" (page 134), and said (135-136):

> "But appellee, having undertaken to serve under conditions permitting competition, now insists that it has a constitutional right by unrestrained cutting of rates to destroy the competitor. And for that purpose it has made reductions from the 60 cent schedule in force until shortly before the Citizens Company entered the field to the flat rate

> of 15 cents, which yields less than the necessary cost of the service. The commission found that the rates specified in the 20 cent schedule are too low, unreasonable, liable to impair the service, and contrary to the public interest. The decision of the state supreme court is to the same effect. 88 Mont. 180, 218; 293 Pac. 294. The facts disclosed by the record are not sufficient to show that the exertion by the commission of its power to prescribe specific rates was arbitrary or an infringement of any constitutional right of the appellee."

The same general thought probably has been expressed many times in recent years. One of the earlier expressions is by Judge Crane, in *People ex rel. South Glens Falls v. P. S. Comm.*, 225 N. Y. 216, 222-223:

> "Reduction in rates seems to be generally recognized as a public benefit, and yet an increase may be equally so. * * * It is a bad political economist who thinks the public is always served best by that which is cheap."

To similar effect are the following quotations:

> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." (*Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456, 478.)

> "A little town with two utility companies might be likened to the owner of a menagerie, whose wild

animals are prone to fight if they come to contact. It is quite in the interest of the owner to prevent the contact." (*Town of Mapleton v. Iowa P. S. Co.*, 209 Iowa 400, 223 N. W. 476.)

The reason why fixing minimum prices to consumers is an important and desirable feature of the plan embodied in the Milk Control Law will be discussed under the next point. For the present, concluding under this point, we merely submit that fixing minimum prices has become a recognized and common form of utility regulation.

## POINT IV.

**The power to fix minimum prices to consumers is an important and desirable feature of the milk control law. It has an actual relation to the public interest and should be sustained.**

Perhaps the fixing of maximum prices to be charged by those engaged in a business carries with it some obligation to fix minimum prices; if the profits to be had in a business are limited by law the government should protect from destructive competition those whose property is risked in the business. This is one view as to the justification for the provision now involved. "What was originally designed to provide immediate relief to the farmer became as well a vehicle for the protection of the distributor." (42 Yale Law Journal, 1265.) However, we believe that is not the real reason or principal justification for this provision. To the contrary, see the material quoted from the Report of the Pitcher Committee, at pages 18-21 of this brief.

As seen by the Legislature through the report of its committee, New York State had more milk than the available fluid markets could take (in the spring and early summer a double supply), nearly all produced under conditions that made it available for the fluid markets and competing for the premium to be obtained there. The distributors, down to the smallest store, carried on a brisk competition, but at the farmers' expense. Falling prices in the cities and villages, secret discounts and free milk and other price concessions, promptly were reflected in lower prices to farmers. In the four years from March 1929 to March 1933 the retail price of milk fell 37%, but the price paid to the farmers fell 61%. The dealers' margin was decreased only 17%. (Report, 15, 96, 181, 182.)

All agriculture is notoriously difficult to control through the law of supply and demand. This is true for a number of reasons, not the least important being that a farm is also a home and a farmer and his family will cling to the soil regardless of profit. Dairying is a branch of agriculture, and it is a biological industry, the "cow cycle" ordinarily being fifteen years from peak to peak. The dairy industry will destroy itself producing below the cost of production with no more manifestation of logical control than a herd of buffalo plunging over a cliff.

Milk is an ideal disease carrier and has need to be produced for the fluid market under safeguards which cost money and which cannot be maintained when the milk check is all absorbed in the feed bill. Milk is a perishable food and the presence of excess milk in a city market under ordinary conditions of human cupidity is a health menace.

The business of receiving and distributing milk requires a considerable investment of capital and its operating expenses are relatively constant per unit of sale. It is a natural monopoly of organization handling an essential commodity, and if it were compelled to accept its even share of such price reductions as those which occurred in the period 1929-1933, or were subjected to stress through the reverse condition of milk shortage, its tendency to monopoly would rapidly be realized and would be attended by various public distresses.

Primarily what the Legislature desired to accomplish was to save the dairy industry from destruction, by giving it a price for milk nearer to the cost of production. The direct approach to this problem was by setting a minimum price to be paid by distributors to producers.

Perhaps this simple approach would have been effective. The original form of the Pitcher bill, which contained no provision for fixing minimum prices to be paid by consumers, evidently intended this method of approach. Somebody must have been strongly impressed by the desirability of ending the destructive competition at the place where it was being waged, and so the minimum-price-to-the-consumer provision was added.

We believe it was a wise addition, as has been demonstrated by the prompt success which attended its original use by the Board. (See this brief, pages 27-28.) The distributors say that its exercise is essential to their protection. (42 Yale Law Journal, 1265.) At

least it is probable that retail prices of milk cannot be raised in line with other commodities without either the exercise of this power or else the usual strikes and disorders.

We submit that the power to fix minimum prices to consumers is an important and desirable feature of the statutory plan. It has an actual relation to the public interest and should be sustained.

## POINT V.

**The statute is constitutional and the conviction should be affirmed.**

Respectfully submitted,

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*Counsel for the Appellee.*

# APPENDIX.

## CONSTITUTIONALITY OF REGULATING MILK AS A PUBLIC UTILITY*

HENRY S. MANLEY

Any proposal for reducing competitive costs in the marketing of New York State milk is a matter of tremendous concern to the people of the State.

At the present moment the *farmer* is most concerned, because present marketing conditions affect him most immediately and severely. Thirteen years ago in this same State there was talk of a milk famine, and the city dweller was most concerned. Ten years before that, in 1910, although the farmer was then being paid about a cent a quart more for his milk than he now is, it was asserted that he was being paid less than the cost of production. In 1910 Attorney General O'Malley investigated the milk business and recommended that it be regulated as a public service utility.[1] In 1920 the same recommendation was made by George Gordon Battle, Royal S. Copeland and Governor Alfred E. Smith.[2] The present crisis has caused the suggestion to be renewed.

Each swing of the pendulum, whether to low price or high, to surplus or shortage, brings out the fact there are certain persistent and expensive abuses in our system of marketing milk. At such a time it is possible to lay aside our usual smugness about the "American System" of Devil-take-the-hindmost, and consider whether the abuses and costs of the competitive system do not out-weigh its benefits, at least

* Distributed Jan. 19, 1933 in mimeographed form to N. Y. S. Breeders Associations. Printed XVIII Cornell L. Quarterly, April, 1933, page 410.

1 Senate Doc. No. 45 of 1910.

2 Legis. Doc. No. 29 of 1920.

relative to services and commodities which are universally essential to human existence.

We are familiar with the idea of the public service utility as applied to railroads, busses, telephones, telegraphs, water companies, gas and electric companies. Nobody would think of returning to the day of unrestricted competition in the serving of those public needs. At a time of trouble in the milk industry we naturally consider the possible application to it of the principles of public utility regulation. In 1920 the suggestion was advanced by the city dwellers, and now it is by the dairymen; if making milk a public utility will eliminate wasteful competitive costs of marketing without introducing other costs as great, all the public will gain by the change.

A strong argument can be made for the proposed change. If no milk receiving plant could be set up or operated without first obtaining a permit from some State agency, which has power to withhold the permit if the proposed territory for the plant already has adequate plant facilities, or if other plants already are supplying all the milk the market requires, we shall have curbed the competition which has caused so many unneeded and expensive plants to be erected and operated. The same regulation can be applied to distributors of milk and milk products. We may hope to see a fair price paid to the producer, and neither he nor the consumer will have the burden of supporting two plants side by side, or a multiplicity of executive organizations and sales forces. There is no more necessity for having half-a-dozen milkmen rattle through the same city street than there is for having it visited by half-a-dozen postmen; there is no more necessity for having two or three milk gathering trucks operate along the same country road than for having as many rural mail carriers.

Of course there is another side to the picture. You cannot give one milk plant the monopoly of serving a township, or one milkman the monopoly of serving a city block, without setting a limit upon the profits to be made by the monopoly you have created. Price-fixing by government necessarily means price-fixing through political processes. Many conservative people will be genuinely alarmed at having the State government, or any other, attempt fixing the price of any commodity, even such a prime essential as milk.

Proponents of the plan may urge that there is far more merit in direct limitation by the government of wasteful competitive processes, than there is for leaving those processes running wild and feeding them, on one side or the other of the struggle, many millions of taxpayers' money, as recently has been done for wheat in the United States and also in Canada. More remote and dubious arguments can be drawn from the tariff, ship subsidies, and other forms of governmental interference in the competitive struggle. It can be pointed out that this State, in the guise of emergency legislation, regulated the price of coal and other fuels in 1922–1923, and of rents in 1920–1929.

Weighing those arguments, so far as they may determine the *wisdom* of making milk a public utility, is not the present business. It may be deemed wiser to enact some form of regulation not quite so drastic, but even so, it is well to know where the constitutional limitation is drawn. Accordingly, this paper will take up the question whether the due process clauses of the State and Federal constitutions will permit milk to be made a public utility.

It is well established that the Legislature can regulate any business or profession to the extent necessary to curb practices which are to the serious disadvantage of the general public. Likewise, it is well established that the courts will jealously review such legislation when it is challenged before them, and in any case where they believe regulation has been carried beyond what is justified by the particular public interest involved, they may determine that the regulatory statute is unconstitutional. The judicial formula in such cases usually is to say that the operation of the statute as applied to an established business, takes without due process of law the property used therein, or as applied to a person prohibited from entering the business, it deprives him of liberty.

For many years admissions to practice medicine and the law have been regulated. In the complexities of modern life it has been found necessary to extend similar regulation to a great many other professions and businesses which require some special skill or capacity, or expose the public to some special risk. In New York State today there are half-a-hundred or more businesses in which a citizen cannot engage unless he first persuades some official or board that he possesses the requisite qualifications, and obtains a license or permit.

But it will be observed that any citizen possessing the appropriate qualifications can insist upon being licensed, and it is doubtful if the courts would sustain an arbitrary limitation of the persons licensed for such a profession or business to those determined by the licensing authority to be required by "public convenience and necessity". That is a further degree in

regulation, reserved for a limited class of businesses which are called public utilities, and are commonly said to be "affected with a public interest."

It is said that in colonial days, and in England at that time, it was common for legislative bodies to fix prices for all important commodities. A very different philosophy has grown up under the Constitution of the United States, and of this State. It has come to be accepted as the general rule, that so far as prices are concerned every business is a law unto itself. The tavern, the ferry, the toll-bridge, the toll-road, and the grist-mill probably were ancient exceptions to that rule, and there have long been laws regulating the rate of interest which may be charged on a loan. It was not until 1877 that our judiciary developed the concept of a "public utility" as a generic exception.

Shortly after 1870 there spread through the middle west a movement which became known as the Grange. It was somewhat associated with the Greenback movement, and was largely a protest against the unrestrained abuses of railroads, grain elevators, and other corporations. It succeeded in having passed by the Legislature of Illinois, and other states, laws fixing maximum fares and charges. There was tremendous public interest in the legal battle which followed. On March 1, 1877, the Supreme Court of the United States sustained the laws fixing rates for railroads, and also the Illinois law fixing the maximum charge which could be made by grain elevators. The latter decision, *Munn v. Illinois*,[3] is recognized as a landmark in constitutional law.

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[3] 94 U. S. 113 (1876).

The court in deciding that case, pointed out that the grain elevator business, established twenty years previously, had assumed immense proportions, was practically a monopoly, and "stood in the very gateway of commerce". The court said, "It is a business in which the whole public has a direct and positive interest", and announced the rule as follows:

> "When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created".

It was said at the time by dissenting judges, and has been repeated many times since, that the rule affords no adequate test for its application to other businesses, and indeed that it argues in a circle. Nevertheless, it has been applied to many businesses, new and old, and utility regulation gradually has assumed the form with which we are familiar today. The utility usually is given complete or partial freedom from competition, its rates are limited to those which will produce a "fair return", and it enjoys a judicial guarantee of minimum rates which will secure such a return.

There is no satisfactory definition of a public utility, and the degree of regulation which is appropriate to one utility may be inappropriate to another. Chief Justice Taft stated the matter as follows;

> "All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion, and to gradual establishment of a line of distinction. * * *"

> "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

That quotation is from his opinion, unanimously concurred in, in the case of *Wolff Packing Co. v. Industrial Court.*[4] That decision in 1923 held invalid a Kansas act attempting to fix wages paid by packers and in certain other essential employments involving the production of food and clothing. The Supreme Court expressly left open the question whether the preparation of food could be subjected to regulation as a utility, because even if it could there was no justification for carrying regulation of such a business to the extent of fixing wages.

The usual regulation characteristic of a public utility is to limit the field to those given certificates of public convenience and necessity, and to fix the prices at which they shall deal with the public. For purposes

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4 262 U. S. 522, 538-539, 43 Sup. Ct. 630, 634 (1923).

of this inquiry into constitutional law it will be assumed that such is the regulation to which it is desired to subject the business of gathering and distributing milk.

Regulation to that extent has been sustained by the Supreme Court of the United States as to common carriers of persons and goods, grain elevators, stockyards, water companies, toll-roads, toll-bridges, wharfs, ferries, insurance companies, banks, public warehouses, electric companies, gas companies, oil pipe-lines, telephone companies and telegraph companies. Recently it has been sustained as to cotton-gins in Oklahoma[5] and as to private contract motor carriers.[6] The power to establish maximum charges for service has been sustained as to livestock commission merchants[7] and as to insurance agents.[8] The same power has been denied as to theatre ticket brokers[9] and as to employment agencies;[10] similarly the power to limit profits of gasoline selling companies has been denied.[11] A statute attempting to regulate as a public utility the ice business in Oklahoma, has been held unconstitutional.[12]

It is somewhat difficult to deduce from those cases any set rule as to what characteristics justify classifying a business as a public utility. Perhaps those cases

5 Frost v. Corporation Comm., 278 U. S. 515, 49 Sup. Ct. 235 (1929).

6 Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181 (1932).

7 Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930).

8 O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931).

9 Tyson & Bro. v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

10 Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928).

11 Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115 (1929).

12 New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

merely illustrate the "process of exclusion and inclusion", of which Chief Justice Taft spoke, and have not yet accomplished the "establishment of a line of distinction." However, already some points along the line can be made out.

Two characteristics almost invariably are found in connection with any business regulated as a public utility. *First*, it supplies some common necessity, so that the public generally is dependent upon it. Probably all the businesses mentioned above, and many others, have that characteristic, in varying degrees.[13] *Second*, its method of operation is such as to attain its greatest efficiency as a monopoly. Corporations supplying gas, electricity and water are not more essential than those supplying coal[14] or flour[15] or gasoline[16] but a distinction can be based upon their manner of doing business. A gas company, an electric company, a water company, a common carrier, a telephone company or a radio broadcasting company, because of the common interests it serves and because of the manner in which it operates, tends to become a monopoly through a bitter and expensive competitive struggle. It is a matter of experience that grain elevators, warehouses, stockyards, grist-mills and cotton-gins frequently manifest the same tendency when located in a community which is greatly dependent upon them. In the past the same evils have not been experienced relative to common businesses such as the grocer, the baker, and the butcher, who require a comparatively

[13] See on this point Robinson, The Public Utility: A Problem in Social Engineering (1928) 14 Cornell Law Quarterly 1, at 9; Robinson, The Public Utility in American Law (1928) 41 Harv. L. Rev. 277; Hamilton, Affectation With Public Interest (1930) 39 Yale L. J. 1089.

[14] See Jones v. Portland, 245 U. S. 217, 38, Sup. Ct. 112 (1917).

[15] See Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. 499 (1920).

[16] See Standard Oil Co. v. Lincoln, 275 U. S. 504 (1927).

small outlay to do business, and until the advent of the chain, those have displayed no tendency towards monopoly.

Besides those two common characteristics of a public utility, certain other characteristics when present in a business aid to the conclusion that it may appropriately be subjected to such regulation. *Third,* the tendency of a business to peculiar abuses, such as any business in which people put a special trust, either as to their health or their property, tends to justify regulation of some sort, which may the more readily take the form of utility regulation. *Fourth,* if the business depends for its operation upon the possession of special franchises, or the power of eminent domain, that fact strongly tends to the conclusion that it may not complain if it is regulated as a public utility. Mere use of the public highway for its profitable business tends to the same conclusion. In *Stephenson v. Binford,*[17] discussing a private contract motor carrier, the matter was stated as follows:

> "It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the Legislature may prohibit or condition as it sees fit."

All of those tests have some application to the business of gathering and distributing milk.

There can be no doubt about its being a common necessity, so that the public is dependent upon those engaged in the milk business. The vast amount of legislation and litigation which have been expended upon it speak eloquently of the public interest in milk. It is difficult to conceive of a more essential commod-

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[17] Supra note 6 at 264, 53 Sup. Ct. at 184.

ity, unless it be water, and a greater proportion of our citizens are dependent upon milk dealers than are dependent upon a public water supply. Besides that dependence of our consuming population upon the milk business, our agricultural population is as dependent upon the milk plant as the pioneer was upon the grist-mill, as the farmers of Illinois were and are upon the grain elevator, as the farmer of Missouri upon the stockyard, as the farmers of Kentucky upon the tobacco warehouse, and as the farmers of Oklahoma upon the cotton gin.

The milk business operates in such a way as to attain its greatest efficiency as a monopoly, and has the tendency to become one. This is not to say that it is now being monopolized in New York State; on the contrary the milk business appears to be engaged in one of those expensive and destructive struggles by which monopoly comes into being. In other states the tendency of the milk business to monopoly has been observed. The dairy companies of Colorado successfully challenged the anti-trust law of that state, because it was too vague in terms.[18] Minnesota failed in its attempt to regulate unfair competition in cream buying because it did not, or could not, put into the record evidence as to how the competition operated and how its statute would curb it.[19] In New York State in the past the milk business has shown its monopolistic tendencies more obviously than at the present time, and it should be possible for the Legislature to act upon that experience, in reasonable anticipation of evils to come,

[18] Cline v. Frink Dairy Co., 274 U. S. 445, 47 Sup. Ct. 681 (1927).
[19] Fairmount Creamery Co. v. Minn., 274 U. S. 1, 47 Sup. Ct. 506 (1927); cf. State v. Central Lumber Co., 226 U. S. 157, 33 Sup. Ct. 66 (1912) and O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 51 Sup. Ct., 130 (1931).

without exposing the citizens of this State to a complete repetition of them.

The use which the milk business makes of the public highways probably amounts to as much in quantity, even if it is somewhat different in nature, from the use by the motor busses, the private contract motor carriers, or the taxicabs. Aside from that use of the highways there is nothing about the milk business requiring special franchises or the right of eminent domain.

The possibilities for abuses which exist in the milk business are numerous, and have resulted in its commonly being required to have permits and licenses in connection with many of its instrumentalities. The health of cattle is a matter of public concern, justifying drastic regulation.[20] Cow-barns are regulated. A milk plant operator must give a bond and be licensed. This law was sustained in *People v. Perretta*,[21] and in his opinion Chief Judge Pound mentioned that there are "conditions of the market peculiar to milk", and the law is designed not merely to protect the farmer, but "to keep open the stream of milk flowing from farm to city." The plant manager must be licensed, and so must the persons making fat tests and bacterial counts, and they are required to report their tests and counts correctly, and keep certain records. There are numerous regulations affecting every phase of the milk business, sanitary and economic, from the time the cows are brought to the barn for milking to the time the empty bottle is returned to the licensed milkman. One dealer is forbidden to use, without permission, the marked bottles and other equipment of an-

20 People v. Teuscher, 248 N. Y. 454, 162 N. E. 484 (1928).
21 253 N. Y. 305, 171 N. E. 72 (1930).

other, and the constitutionality of that law has been sustained.[22] The milk business from beginning to end is the most completely regulated business in existence, except the railroads. Making it a public utility may be a decided change in the form of regulation, but it need not be a startling change in its extent.

In sustaining the constitutionality of a law under which the license of a milk plant operator was revoked for over-reading the Babcock test of cream purchased the Supreme Court of North Dakota said:[23]

> "The creamery business is essentially a business which is affected with a public interest, and as such is generally subject to governmental regulation. * * * * The purpose of the statute, indeed, is well known, and is to build up and to develop the dairying and stock raising industries of the state. It is to destroy the unfair competition by which the financially stronger foreign creameries, and butter and cheese and ice cream factories, may destroy those of this state by overgrading or overmeasuring until the local creameries are driven to bankruptcy, and then control the grades and prices. * * * Licenses, indeed, may be imposed not merely for the purpose of acting as temporary permissions to engage in harmful occupations, but in order to so control those that are useful that their operation may be harmless, and that they may really subserve the public good, which, after all, is the basis of all property rights."

While the cases of *Fairmount Creamery Co. v. Minn.*,[24] *Williams v. Standard Oil Co.*,[25] and *New State Ice Co. v. Liebmann*,[26] all referred to above, will re-

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22 People v. Ryan, 230 App. Div. 252, 243 N. Y. Supp. 644 (4th Dept. 1930).

23 Cofman v. Osterhaus, 40 N. D. 390, 400, 401, 168 N. W. 826, 828, 829, 18 A. L. R. 219 (1918).

24 Supra note 19.

25 Supra note 11.

26 Supra Note 12.

quire careful study in connection with the proposal to make the gathering and distribution of milk and milk products a public utility, it is probable that such a statute, if the facts in justification of it are carefully made of record by a legislative report or otherwise[27] will be held by the courts to be constitutional.

At least three experiments along the line of making milk a public utility have been attempted already. In November, 1931, the city of Portland, Oregon, passed an ordinance requiring milk dealers to file their prices with the city auditor, and to file all changes in price seventeen days before they should be effective. Early in 1932 the Province of Manitoba, Canada, amended its Public Utilities Act and authorized the Public Utilities Board of the Province, in case of an emergency when producers and distributors could not agree upon a fair price for milk, to control the buying and selling of that commodity. The Board's power has been exercised by an order of September 2, 1932, establishing a $1.55 per hundred price for 3.5 milk in Winnipeg area (an increase from less than a dollar a hundred before the order) and establishing retail prices of ten cents a quart delivered, or eight cents a quart at the stores.

In December, 1932, the Attorney General of Wisconsin advised the commissioners of agriculture and markets of that state that their power to regulate "unfair trade practices" included power to fix prices to producers for milk to be sold in fluid form within the city of Milwaukee. By an order of December 27, 1932, the commissioners fixed such prices.

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27 See H. W. Bikle, Judicial Determination of Questions of Fact Affecting Constitutional Validity of Legislative Action (1924) 38 Harv. L. Rev. 6.

## INDEX.


I. Preliminary statement ..... 2
II. Argument ..... 6
Summary of argument ..... 6
Point A ..... 7
The Federal Constitution was not intended to interfere with the reasonable exercise of the police power of a state to enact laws for the protection and promotion of the public health, safety or welfare ..... 7
The court is merely concerned with the question of whether the exercise of the police power is proper ..... 8
Point B ..... 9
The right and liberty of contract is not an unlimited right and may be abridged or restricted whenever necessary for the public good or welfare ..... 9
There is no such right as absolute liberty of contract ..... 9

Point C..... 10
The contract clause and the due process clause of the Federal Constitution are merely a limitation on the exercise of the police power of the state but not superior to the exercise of that power..... 10
Point D..... 11
The Fourteenth Amendment to the Constitution of the United States does not prevent a state, when exercising its police power for the purpose of promoting the public welfare by promoting the economic welfare of dairy farmers and assuring an adequate supply of milk to consumers, from fixing the minimum price for which milk may be sold..... 11
Point E..... 14
The business of producing, processing, distributing and selling milk is an activity so charged and affected with a public interest that it may be regulated under the police power of the state and such regulation may include the fixing of a minimum price for which milk may be sold..... 14
The prohibition of giving rebates contained in the New York law is incidental to the power of price fixing..... 15
Point F..... 18
The fixing of minimum prices for milk during the present emergency declared by the Legislature is a valid exercise of the police power.. 18
Conclusion ..... 20
Appendix—Sections 23 and 24 of the Burk Law.... 21

## Cases and Authorities Cited.


Atlantic Coast Line R. Company v. Goldsboro, 232 U. S., 548-558 ..... 10
Barbier v. Connolly, 113 U. S., 27, 31 ..... 8
Block v. Hirsch, 256 U. S., 135 ..... 9, 18, 20
Boston Beer Company v. Massachusetts, 97 U. S., 989 8
Brown Holding Company v. Feldman, 256 U. S., 170. 18
Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567 ..... 9, 10, 18
Fairmont v. Minnesota, 274 U. S., 1 ..... 11
German Alliance Insurance Company v. Lewis, 233 U. S., 389 ..... 8, 15
Gorieb v. Fox, et al., 274 U. S., 603 ..... 8
Holden v. Hardy, 169 U. S., 366-398 ..... 8
Legal Tender Cases, 12 Wall., 547-551 ..... 9
Levy Leasing Company v. Siegel, 258 U. S., 242, 66 L. Ed., 594, 86 A. L. R., 1539 ..... 20
Louisville and Nashville Railroad v. Melton, 218 U. S., 36, 52 ..... 8
McLean v. Arkansas, 211 U. S., 539 ..... 8
Mueller v. Oregon, 208 U. S., 411, 52 L. Ed., 551, 555. 8
Munn v. Illinois, 94 U. S., 113 ..... 15
Murphy v. California, 225 U. S., 625, 56 L. Ed., 1229, 1232 ..... 8
New Orleans Gas Light Company v. Manufacturing Company, 115 U. S., 650 ..... 8
N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556-557.. 9
Otis v. Parker, 187 U. S., 606 ..... 16
Rast v. Van Deman & Lewis, 240 U. S., 342 ..... 15
Schmidinger v. Chicago, 226 U. S., 578-579 ..... 9

Slaughter House Cases, 83 U. S., 394 ..... 8
United States and Henry Wallace, Secretary of Agriculture v. Calistan Packers, Inc., Opinion, October 2, 1933 ..... 19
Warehouse Co. v. Burley Tobacco Growers, 276 U. S., 71 ..... 16
Wilson v. New, 243 U. S., 332 ..... 18

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1933.

No. 531.

LEO NEBBIA,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it please the Court:

The undersigned, as counsel for the state of Ohio, respectfully moves this honorable court for leave to file the accompanying brief as amicus curiae.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for the State of Ohio, as Amicus Curiae.

Of Counsel:

CHARLES G. WILLIAMS,
ISADORE TOPPER,
Assistant Attorneys General of Ohio.

## BRIEF OF JOHN W. BRICKER, ATTORNEY GENERAL OF OHIO, AS AMICUS CURIAE.

### I.

### PRELIMINARY STATEMENT.

This brief is filed on behalf of the people of the state of Ohio because the effectiveness of practically all of the legislation recently enacted with reference to the milk industry in Ohio and elsewhere depends upon legislation similar to that which is challenged in this case. That the present depression has created a national emergency needs no argument. The cause of the emergency is not military but economic. The results of the emergency imperil the health, safety, convenience and general welfare of every citizen. Unparalleled conditions have required unprecedented (unusual) actions in state and nation. This action has been secured by voluntary cooperation in large measure, but in the last analysis such action is dependent upon laws and penalties which enforce obedience upon a small minority who are not in accord with the emergency measures undertaken.

The state of Ohio has enacted a milk marketing law which is similar in its provisions to the law in New York which is under consideration in this case. Prior to the enactment of this law (Burk Act, House Bill No. 671, enacted by the General Assembly of Ohio in 1933), the milk industry in Ohio was in chaotic condition by reason of the breaking down and demoralization of the milk market. Recognizing the seriousness of the situation,

the governor of Ohio on September 29, 1932, in a special message to the 89th General Assembly which had been called into special session for another purpose, amended his call for that special session so as to include the consideration of the creation of a milk marketing commission. Pursuant to the message of the governor and on the same day, a joint house resolution was adopted for the purpose of investigating the necessity for such legislation. A committee was appointed. It made a report and the aforesaid Burk Bill was the result of that investigation. The Burk Law provides for an Ohio Milk Marketing Commission similar to the New York Milk Control Board, and the Ohio Milk Marketing Commission has similar powers of investigation, of price fixing, of issuing licenses, of enforcement and of price schedules.

The statement of the purpose of the Ohio law was stated by the Legislature in Section 2 of the bill and reads as follows:

> "The production, processing, distribution and sale of milk in this state as a whole, and each of said activities or operations, separately, is hereby declared to be a business charged with a public interest. The reason therefor lies in the following facts:
>
> Milk under present conditions is a necessary article of human food for which there is no adequate substitute. The procurement and maintenance of an adequate supply of milk, of proper chemical and physical content, and free from contamination or source of infection, is vital to the public health.
>
> Under the social conditions obtaining in this state, the needs of a great majority of the people for milk cannot be satisfied excepting through a system of distribution which can effectively bridge the gap between the producer and the ultimate consumer.

Sanitary regulations and standards of content and purity adopted by health authorities, however effectively enforced, have been found in actual experience in this state insufficient in and of themselves to insure such control of the system of marketing milk as to safeguard the consuming public and the persons engaged in the milk industry in its various branches against evils which threaten the economic integrity of the industry and tend to undermine such health regulations and standards themselves. Such evils consist of unfair, unjust, destructive and demoralizing trade practices, which have been and are now being carried on in the production, sale and distribution of milk. The conditions resulting therefrom constitute a menace to the health and welfare of the inhabitants of this state.

It is and has been the policy of this state to foster and encourage sound and effective methods of marketing agricultural food products of this state, as evidenced by the creation of the bureau of markets in the department of agriculture, pursuant to Section 1089-2 of the General Code, by the enactment of laws relative to co-operative agricultural associations, as evidenced by Sections 10186-1 to 10186-30 of the General Code, and particularly by Section 10186-26 thereof, and to protect the agricultural interests of this state against unfair and discriminatory practices in connection with marketing, as evidenced by Section 6401-2 of the General Code.

As a result of this policy the normal process of marketing milk has come to be a co-operative enterprise which ought to be safeguarded and protected by social control. It is the intent and purpose of this act more effectually to promote the settled policy of this state as so established, so far as the marketing of milk is concerned, and to provide an effective means of social control to that end."

The Burk Act was passed as an emergency measure by a two-thirds vote of the Ohio Legislature and is declared to be "necessary for the immediate preservation of the public peace, health and safety". (Section 24). Section 23 provides that this act shall expire on the first day of July, 1935. After the Burk Act was enacted by the Legislature of the state of Ohio, a milk marketing commission was appointed in accordance with the terms of the act. Thereafter the Ohio Milk Marketing Commission fixed a minimum retail price schedule for milk for the city of Columbus, Ohio. That price schedule has been violated by a certain chain grocery company and the validity of the schedule has been challenged in the Supreme Court of Ohio wherein an action in quo warranto has been filed against the aforesaid violator in order to enforce the provisions of the Burk Act. In that action the constitutionality of the Burk Act has been challenged. The main issue in that case is similar to that in the instant case, that is, whether the state has the power to fix a minimum retail price for milk during the present emergency and whether the Federal Constitution prohibits a state from passing legislation fixing a minimum retail price for milk in the present emergency.

## II.

## ARGUMENT.

### SUMMARY OF ARGUMENT.

#### Point A.

The Federal Constitution was not intended to interfere with the reasonable exercise of the police power of a state to enact laws for the protection and promotion of the public health, safety or welfare.

#### Point B.

The right and liberty of contract is not an unlimited right and may be abridged or restricted whenever necessary for the public good or welfare.

#### Point C.

The contract clause and the due process clause of the Federal Constitution are merely a limitation on the exercise of the police power of the state but not superior to the exercise of that power.

#### Point D.

The Fourteenth Amendment to the Constitution of the United States does not prevent a state, when exercising its police power for the purpose of promoting the public

welfare by promoting the economic welfare of dairy farmers and assuring an adequate supply of milk to consumers, from fixing the minimum price for which milk may be sold.

**Point E.**

The business of producing, processing, distributing and selling milk is an activity so charged and affected with a public interest that it may be regulated under the police power of the state and such regulation may include the fixing of a minimum price for which milk may be sold.

**Point F.**

The fixing of minimum prices for milk during the present emergency declared by the Legislature is a valid exercise of the police power.

## POINT A.

### The Federal Constitution Was Not Intended to Interfere With the Reasonable Exercise of the Police Power of a State to Enact Laws For the Protection and Promotion of the Public Health, Safety or Welfare.

This court has on numerous occasions held that the Federal Constitution is not intended to interfere with the police power of a state to enact legislation for the protection and promotion of the public health, safety or welfare, provided such legislation is reasonable and has

a real and substantial relation to the public object sought to be accomplished.

**Barbier v. Connolly**, 113 U. S., 27, 31;
**Murphy v. California**, 225 U. S., 625, 56 L. Ed., 1229, 1232;
**McLean v. Arkansas**, 211 U. S., 539;
**Louisville and Nashville Railroad v. Melton**, 218 U. S., 36, 52;
**Mueller v. Oregon**, 208 U. S., 411, 52 L. Ed., 551, 555; and
**New Orleans Gas Light Company v. Manufacturing Company**, 115 U. S., 650.

**The Court Is Merely Concerned With the Question of Whether the Exercise of the Police Power Is Proper.**

It is a familiar rule of law that the Legislature determines the necessity for the legislation and the courts determine if it is a proper exercise of its police power.

**Slaughter House Cases**, 83 U. S., 394;
**Boston Beer Company v. Massachusetts**, 97 U. S., 989;
**German Alliance Insurance Company v. Lewis**, 233 U. S., 389;
**Holden v. Hardy**, 169 U. S., 366, 398;
**Gorieb v. Fox, et al.**, 274 U. S., 603;
**McLean v. Arkansas**, supra.

## POINT B.

### The Right and Liberty of Contract Is Not An Unlimited Right And May Be Abridged Or Restricted Whenever Necessary For the Public Good Or Welfare.

The so-called right or liberty of contract, the protection of which is usually invoked in cases of this type, is not an unlimited or unbridled right or privilege but is a right or privilege which is subordinate to any legislative enactment which has for its object the comfort, the safety, the convenience, the general prosperity or welfare of society.

**N. Y. & N. E. R. R. Co. v. Bristol**, 151 U. S., 556, 557;
**McLean v. Arkansas**, 211 U. S., 539, 545, 547;
**Chicago B. & Q. R. Co. v. McGuire**, 219 U. S., 549, 567;
**Legal Tender Cases**, 12 Wall., 547, 551.

### There Is No Such Right As Absolute Liberty of Contract.

This court has held that there is no such thing as the absolute liberty of contract.

**Schmidinger v. Chicago**, 226 U. S., 578, 579;
**Block v. Hirsch**, 256 U. S., 135.

## POINT C.

**The Contract Clause and the Due Process Clause of the Federal Constitution Are Merely a Limitation on the Exercise of the Police Power of the State But Not Superior to the Exercise of That Power.**

It is also a familiar rule that neither the contract clause nor the due process clause of the Constitution is superior to the exercise of the police power of the state. **Chicago B. & Q. R. Co. v. McGuire**, supra; **Atlantic Coast Line R. Company v. Goldsboro**, 232 U. S., 548, 558. The broad power of sovereignty called the police power which may invade the right of contract protected by the Federal Constitution and which invasion has been upheld by the courts of this country many times is a power that is indefinable and the courts have confessed their inability to form a general definition for that power. By reason of this inability to form a general definition, the courts have constantly dealt with each case separately so that an examination of the cases wherein the exercise of this power has been questioned merely shows the different phases of its application to various subjects. The police power has been exercised in many ways and it generally consists of either regulatory or prohibitory legislation. The various subjects which have received legislative attention because of public interest are too innumerable to mention in this brief.

## POINT D.

**The Fourteenth Amendment to the Constitution of the United States Does Not Prevent a State, When Exercising Its Police Power For the Purpose of Promoting the Public Welfare By Promoting the Economic Welfare of Dairy Farmers and Assuring an Adequate Supply of Milk to Consumers, From Fixing the Minimum Price For Which Milk May Be Sold.**

It is "the duty of the court to inquire into the real effect of any statute". **Fairmont v. Minnesota,** 274 U. S., 1. The real effect of the New York law under consideration and similar laws is quite clear. By requiring a minimum retail price, such a law provides a stable market not subject to underselling and price cutting of milk and, since the distributors' share of the retail price is also fixed and under control, a minimum price is secured for the farmer for his milk. The effect of this is that the farmer gets a better price for his milk and a more steady price. The effect of this increase in stabilization of the farmer's purchasing power is that he will buy more of the manufactured products of the city and this will tend to improve general economic conditions and improve the general welfare. It is a theory of present day economic law that the existing economic dilemma results from the fact that we do not have enough consumers, and that the modern economic cycle

tends to become a vicious circle wherein the purchasing power of the mass of the people becomes progressively less. To break this vicious circle and to initiate a benevolent cycle whereby the purchasing power of the general public is increased is a problem with which the nation and many states are now grappling. Evidently, in the mind of the Legislature, one way to do this was to fix a price for a necessity sufficient to increase and stabilize the purchasing power of the producer of that necessity. This is what the milk law proposes to do. Many voluntary methods of increasing the price of commodities have been attempted and many circuitous attempts to increase these prices involuntarily have been attempted. The New York law proposes to fix a proper price for milk simply by fixing it. Is such an act forbidden under the Fourteenth Amendment? It seems to us that the answer is no, inasmuch as this legislation is not in terms in conflict with the provisions of the Constitution of the United States. It is perhaps in conflict with many economic interpretations of the Constitution laid down by this court. In the present emergency, we have found that many so-called "economic laws" have been deemed unworkable or inadequate under present circumstances or were never laws at all. This court has in the past interpreted the Constitution in the light of some of these economic laws which were in accord with the best judgment and sense of justice then prevailing. Unless the changes in these economic laws are considered by this court in interpreting the Constitution, legislation which is necessary to cope with the present emergency

will be held invalid and in the stress of the emergency the people will be helpless to enforce the very measures which they deem are necessary to promote the welfare and the convenience of the public. It seems to us that the only way a state can protect the well-being of its citizens and at the same time prevent the bankruptcy of an industry which is closely identified with and related to the public welfare is by the exercise of the police power in the manner in which the Legislature of New York has exercised it in the instant case. By fixing the minimum price for which milk may be sold, the Legislature in effect assures the producer and the distributor of milk an adequate return for their investment and labor. Such an assurance accomplishes both the purpose of protecting the well-being of its citizens and at the same time prevents the bankruptcy of the milk industry. That there is an interrelation between the price received by the producer and distributor of milk and the supply and quality of milk received by consumers is a fact which needs no supporting data or argument. At first blush, it may perhaps be felt that the act of fixing the minimum price at which milk may be sold is an attempt to disregard and discard the economic law of supply and demand. However, on fuller consideration, it would appear, in view of the emergency that exists in the milk industry throughout the country, especially in the state of New York, that the law authorizing price fixing is merely an attempt to aid the economic law of supply and demand to function normally by preventing the sale of milk at prices which are insufficient to assure producers and distributors a return which fact tends to demoralize the market and the industry.

## POINT E.

**The Business of Producing, Processing, Distributing and Selling Milk is an Activity So Charged and Affected With a Public Interest That It May Be Regulated Under the Police Power of the State and Such Regulation May Include the Fixing of a Minimum Price For Which Milk May Be Sold.**

The Legislature of New York has found that the fluid milk industry is clothed with a public interest as has the Legislature of the state of Ohio. These findings are based upon extensive economic studies. Milk is unquestionably the sole food for babies and certain invalids, and is imperative for growing children. Milk contains elements needed by every human being, which elements can be supplied in no other way as economically. Milk, especially fluid milk, is highly perishable and must be distributed comparatively near its place of production. A herd of cows produces milk seven days a week; the production of a herd is based not upon the economic laws of supply and demand, and is only slightly under the control of its owner. The dairy farmer must sell his milk immediately upon its production at a place not too far from his farm. Public health requirements for milk are an expense to the producer and to the distributor. Entirely apart from the economic benefit to the producer the legislatures have come to the conclusion that the maintenance of a stable market for milk is imperative

for the preservation of the public health and that such a stable market can only be maintained by requiring minimum prices and forbidding price cutting which eventually leads to chaos. Is there anything in the Constitution which would require this court to thwart this purpose in order to protect the so-called sacred right of certain retailers to undersell to the detriment of the producers of milk and to their own ultimate detriment? This court in the past has answered that question in the negative. Thus, it was held in the case of **Munn v. Illinois**, 94 U. S., 113, that legislatures could fix prices in a business which was "clothed with a public interest".

See also,

**German Alliance Insurance Company v. Lewis**, 233 U. S., 389.

**The Prohibition of Giving Rebates Contained in the New York Law is Incidental to the Power of Price Fixing.**

In **Rast v. Van Deman & Lewis**, 240 U. S., 342, this court upheld a tax law, the "real effect" of which was to prohibit "profit-sharing coupons and trading stamps." This court did not deny the contention of complainants that these coupons "are but a method of giving discount, practically in some instances a rebate upon the price. * * *" (263) This court, in considering the real effect of such rebating found that it might be considered as having the seduction and evil of something like a lottery and it thus might be a matter of legislation as to whether such practice should be stopped. Mr. Justice McKenna, in the course of his

opinion, quoted the following from **Otis v. Parker**, 187 U. S., 606:

> "But it may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance. 'While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.' "

In the present case this court is called upon to uphold a law forbidding rebating in order to protect milk marketing agreements. The protection of similar cooperative agricultural agreements has been upheld by this court. In **Warehouse Co. v. Burley Tobacco Growers**, 276 U. S., 71, this court upheld a law which provided a fine for interfering with tobacco growers' cooperative association contracts. The purpose of the cooperative marketing agreements was, of course, to secure a larger return to the farmer, the very purpose of the New York law now before the court. In the tobacco growers case Mr. Justice McReynolds said (92):

> "Undoubtedly the statute does prohibit and penalize action not theretofore so restricted and to

that extent interferes with freedom. But this is done to protect certain contracts which the Legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe."

Referring to the cooperative marketing statutes it was said (92):

"These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest."

In the court below it was said:

"We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power."

These words apply with equal force to the dairy farmer who is protected by the milk marketing laws.

In **Chicago B. & Q. Ry. Co. v. McGuire**, 219 U. S., 549, Mr. Justice Hughes said (567):

> "* * * freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards."

## POINT F.

### The Fixing of Minimum Prices for Milk During the Present Emergency Declared by the Legislature Is a Valid Exercise of the Police Power.

This court has sustained far greater infringements on the right of contract in emergencies which were less stringent in their economic aspect than the present emergencies.

**Wilson v. New**, 243 U. S., 332;
**Block v. Hirsch**, 250 U. S., 134;
**Brown Holding Company v. Feldman**, 256 U. S., 170.

The lower courts in interpreting marketing laws during this emergency have upheld the constitutionality of measures similar to the one in this case.

The provisions of the agricultural adjustment act passed by Congress are similar to the New York milk distribution act. The act of Congress was held consti-

tutional in the case of **Beck v. Wallace, Secretary of Agriculture,** in the Supreme Court of the District of Columbia. The plaintiff, a milk dealer, attempted to enjoin the enforcement of the milk marketing regulations for the Chicago milk shed. The court denied the injunction and dismissed the complaint, holding:

> "The day is passed when absolute vested rights in contract or property are to be regarded as sacrosanct or above the law. Neither the necessities of life nor commodities affected with the public interest can any longer be left to ruthless competition or selfish greed for their production or distribution.
>
> The court finds that the agricultural adjustment act passed by Congress May 1, 1933, is constitutional, and that the regulations and licenses promulgated and issued thereunder are reasonable and valid."

In the case of **United States and Henry Wallace, Secretary of Agriculture v. Calistan Packers, Inc.,** defendant, in the United States District Court, San Francisco, California, an opinion was handed down, October 2, 1933, by Judge St. Sure, upholding the constitutionality of the licensing provisions issued to enforce agreements entered into under the A. A. A.

The court reviewed the economic situation of the country and the connection of the peach industry with it, and held:

> "The due process clause in such a situation cannot properly be construed to obstruct the national policy. Neither the Constitution nor the due process clause requires the perpetuation of conditions which impair the national vitality.

> To adopt the view that the Constitution is static and that it does not permit change from time to time to take such steps as may reasonably be deemed appropriate to the economic preservation of the country is to insist that the Constitution was created containing the seeds of its own destruction. This court will not subscribe to such a view."

The declaration of an emergency contained in the New York law, although not conclusive upon this court, is entitled to great respect. See **Block v. Hirsch**, 256 U. S., 134; **Levy Leasing Company, Inc. v. Siegel**, 258 U. S., 242, 66 L. Ed., 594; 86 A. L. R., 1539 (note on governmental powers in peace time emergency).

## CONCLUSION.

In view of the foregoing, we submit that it is a valid exercise of the police power for a state Legislature in an emergency to fix a minimum price at which milk may be sold, and for that reason the constitutionality of the New York law should be upheld.

Respectfully submitted,

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for the State of Ohio, as Amicus Curiae.

Of Counsel:

CHARLES G. WILLIAMS,
ISADORE TOPPER,
Assistant Attorneys General of Ohio.

## APPENDIX.

Sections 23 and 24 of the Burk Law (House Bill No. 671, enacted by the General Assembly of Ohio in 1933) read:

Section 23. Unless extended by the General Assembly, this act shall expire on the first day of July, 1935, and all books, papers and records of the Ohio milk marketing commission hereby created shall be thereafter disposed of as the director of agriculture may prescribe.

Section 24. This act is hereby declared to be an emergency law, necessary for the immediate preservation of the public peace, health and safety. The reason for such necessity is that evils consisting of unfair, unjust, destructive and demoralizing trade practices are now being carried on in the production, sale and distribution of milk for human food, resulting in the undermining of existing health regulations and standards, the demoralization of the agricultural interests of this state engaged in the production of milk, and conditions inimical to the health of milk consumers; and that such conditions have progressed to the point of immediate danger not only to the public health but also to the public peace and safety. Therefore, this act shall take effect immediately.

# INDEX


| | PAGE |
|---|---|
| Notice of Motion | 1 |
| Proof of Mailing Notice of Motion and Petition to File Brief as Amicus Curiae | 3 |
| Motion for Leave to File Brief as Amicus Curiae | 4 |
| Statement | 5 |
| Petition for Leave to File Brief as Amicus Curiae on Behalf of the State of New Jersey | 6 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1933.

No. ~~518~~ 531

LEO NEBBIA,
*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent.*

## NOTICE OF MOTION.

To:

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, Capitol, Albany, New York, and

ARTHUR E. SUTHERLAND, JR., ESQ., Counsel for Appellant, 76 William Street, New York, New York.

SIRS:

Please take notice that William A. Stevens, Attorney-General of the State of New Jersey, counsel for the New Jersey Milk Control Board, has filed a petition with the Supreme Court of the United States for leave to file a brief as

amicus curiae in the above entitled cause, a copy of which is annexed hereto.

Respectfully,

WILLIAM A. STEVENS,
Attorney-General,

ROBERT PEACOCK,
Assistant Attorney-General,
*Counsel for Petitioner,*
State of New Jersey.

Dated: November 22, 1933.

## Proof of Mailing Notice of Motion and Petition to File Brief as Amicus Curiae.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.:

VIRGINIA M. RAHILLY, of full age, being duly sworn according to law, on her oath deposes and says:

1. On November 22, 1933, I deposited in the United States Post Office in the City of Trenton, New Jersey, in a sealed envelope with postage prepaid by registered mail, a true printed copy of the foregoing notice and annexed motion and petition, addressed to each of the following persons;

The Attorney-General of the State of New York, Capitol, Albany, New York.

Arthur E. Sutherland, Jr., Esq., Counsel for Appellant, 76 William Street, New York, New York.

VIRGINIA M. RAHILLY.

Sworn and Subscribed before me
this 22d day of November, 1933.

MARGARET NASON,
Notary Public of New Jersey.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. ~~315~~ 531

LEO NEBBIA,
*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent.*

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Comes now the State of New Jersey, by its Attorney-General, attorney for the Milk Control Board of the State of New Jersey, and asks leave of the Court to file a brief as amicus curiae in the above stated cause, in accordance with the prayer of the petition submitted herewith.

WILLIAM A. STEVENS,
Attorney-General,

ROBERT PEACOCK,
Assistant Attorney-General,
*Counsel for Petitioner,*
State of New Jersey.

Dated: November 22, 1933.

## STATEMENT.

The purpose of this petition is to obtain leave to file a brief as amicus curiae on behalf of the State of New Jersey, as the act of the Legislature of the State of New Jersey concerning the Milk Control Board, and the production and sale of milk, is almost identical with the New York statute and whatever decision is rendered in this case would affect the Milk Act of the State of New Jersey, as the interests of the States of New York and New Jersey are common.

IN THE

SUPREME COURT OF THE UNITED STATES.

LEO NEBBIA,
*Appellant,*
*vs.*
THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent.*

## PETITION TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE STATE OF NEW JERSEY.

The petition of William A. Stevens, Attorney-General of the State of New Jersey, counsel for the New Jersey Milk Control Board, is as follows:

1. The petitioner, William A. Stevens, Attorney-General of the State of New Jersey, and the New Jersey Milk Control Board desire to file a brief in your Honorable Court in the above stated cause as amicus curiae.

The State of New Jersey on May 23, 1933, passed an act creating a Milk Control Board, prescribing its functions, rules and regulations, and a copy of the said act is attached hereto and made a part of this petition.

2. Petitioner understands that the Supreme Court of the United States is to pass upon the legality of a conviction of

Leo Nebbia, charged on an information filed by the Milk Control Board of the State of New York with the sale of milk, which the State of New York holds is a violation of Section 213, subdivision (e) of the Agriculture and Markets Law. The interests of the State of New Jersey and the State of New York of the milk laws of the respective states are common, and suits are now pending in the courts of the State of New Jersey for violations of the Milk Control Act, which cases are likely to be appealed to the Supreme Court of the United States concerning the constitutionality of the act of the State of New Jersey.

3. The Milk Control Act of the State of New Jersey was copied from the Milk Control Act of the State of New York and both acts are identical with the exception of a few minor changes. The interest of the State of New Jersey in the decision of your Honorable Court in the above stated cause, is the same as that of the State of New York, and the same questions involved in this case would be involved in the constitutionality of the Milk Control Act of the State of New Jersey.

4. The State of New Jersey is interested in the decision of your Honorable Court in the above stated cause, and respectfully requests your Honorable Court to grant permission to the Attorney-General of the State of New Jersey to file its brief as amicus curiae.

WILLIAM A. STEVENS,
Attorney-General,

ROBERT PEACOCK,
Assistant Attorney-General,
*Counsel of Petitioner,*
State of New Jersey.

STATE OF NEW JERSEY

# Milk Control Board

## CHAPTER 169, LAWS OF 1933

An Act to Regulate and Control the Purchase, Distribution and Sale of Fluid Milk and Cream and to Create a State Board of Milk Control

Trenton, N. J. May, 1933

# STATE OF NEW JERSEY

## CHAPTER 169, LAWS OF 1933

AN ACT to regulate and control the purchase, distribution and sale of fluid milk and cream and to declare an emergency, and for this purpose to create a State board of milk control, defining its powers and duties and providing penalties for violations.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

DECLARATION OF LEGISLATIVE POLICY AND INTENT

WHEREAS, During the past six months groups of producers of milk in many sections of the United States have joined together and have adopted various means or methods to control the production, sale and distribution of fluid milk, which, in their opinion, would force a better return to the milk producers, and some of the means adopted consisted of milk strikes, refusal to permit milk to be delivered to distributors and consumers, destruction and dumping of milk, and picketing, to prevent the delivery of milk to distributors and consumers; and

WHEREAS, In many communities these methods have been pursued to the extent that the public were denied a sufficient supply of good wholesome milk; and

WHEREAS, In certain sections of this nation nearby markets are not available for the local producer, with the result that fluid milk is being shipped into the State of New Jersey and into the New York and Philadelphia milk sheds at such price that the producers who supply milk to the resi-

dents of this State are now unable to receive such a return for their milk that will reimburse them for the actual cost of production of good clean milk; and

WHEREAS, Efforts are now being made to organize the producers in the Philadelphia and New York milk sheds, including the State of New Jersey, so as to restrict or limit the milk supply by picketing or other means, in order to force a higher price for fluid milk. In the event of such results being accomplished, the health of the citizens of this State may be seriously affected. The State of New York recognizing the seriousness of the situation has already enacted into law a measure which they believe will protect the citizens of that commonwealth; and

WHEREAS, By reason of the action of the State of New York it becomes imperative that similar precautionary measures be put into effect in this State; therefore,

1. It is declared that the Legislature of the State of New Jersey, in the exercise of the police power reserved to the States in order to protect the public health and welfare of the inhabitants of this State, does hereby declare this act to be an emergency law, necessary for the immediate preservation of the public peace, health and safety.

The reason for such necessity is that evils consisting as hereinbefore recited, of unfair, unjust, destructive and demoralizing practices are now being carried on in the production, sale and distribution of milk for human food, which are likely to result in the undermining of health regulations and standards, the demoralization of the agricultural interests of this State engaged in the production of milk, and the creation of conditions inimical to the health of milk consumers. Such conditions have progressed to the point that there is immediate danger not only to the public health, but also to the public peace and safety, and it is the intent of this act to correct those unfair, unjust, destructive and demoralizing practices.

## Article I

### DEFINITIONS

1. Words used in this act, unless otherwise expressly stated, or unless the context or subject matter otherwise requires, shall have the following meaning:

"Board"—The milk control board.

"Person"—Any individual, person, firm, association or corporation.

"Milk Dealer"—Any person who purchases for sale, produces for sale direct to consumer, purchases for distribution, distributing broker, any person who purchases, distributes or handles within or without the State, for storage, manufacture or sale in this State, except for consumption on the premises of the producer, milk and cream. Any co-operative association organized under any law of this or any other State is declared to be a milk dealer or producer within the meaning of this act as the board may determine.

"Market"—Any municipality, incorporated or unincorporated, of this State, other than a county, including any natural marketing area designated by the board.

"Licensee"—A licensed milk dealer.

"Milk"—The natural product of a dairy animal or animals, and includes such product when cooled, pasteurized, condensed or concentrated except when contained in hermetically sealed cans, with a view to being sold as milk and also cream, buttermilk and skimmed milk, sold or intended to be sold as such for human food; said term excludes the natural product of a dairy animal or animals sold or intended to be sold for any other purpose.

"Producer"—Any person producing milk and/or cream delivered or to be delivered to any dealer or to any market in this State.

"Consumer"—Any person, other than a milk dealer, who purchases milk for fluid consumption.

"Sanitary regulations"—All laws enacted by the State of New Jersey; ordinances and regulations enacted or adopted by municipalities, municipal boards of health, or municipal departments, or

officials exercising the powers and duties of local boards of health, relating to the production, handling, transportation, distribution and sale of milk within this State.

## ARTICLE II

### MILK CONTROL BOARD

1. (a) The Secretary of the Board of Agriculture, and a member of the State Board of Health to be designated by said board and a person to be appointed by the Governor are hereby constituted a milk control board for the purpose of effectuating the provisions of this act. The terms of office of the members of the board thereof shall be coincident with the terms for which they are severally appointed to the Department of Agriculture and to the board of health and the member appointed by the Governor shall serve during the pleasure of the Governor. Technical and other services for such milk control board shall be performed, so far as practicable, by forces or officers in the Department of Agriculture and when required by forces or officers in the State Department of Health, without additional compensation, but the milk control board may appoint and at pleasure remove the secretary of the milk control board, and any such additional technical, legal and other assistants and employees as may be necessary to carry out the provisions of this act and to prescribe their powers and duties.

(b) The members of the milk control board shall serve without pay, but shall, upon certification by the majority of the members of said board, be reimbursed for their actual and necessary expenses as required in the performance of their duties as prescribed by this act.

(c) The board shall fix the compensation of such appointees which, in case of the secretary, shall not exceed the sum of three thousand dollars ($3,000.00) per annum.

(d) All positions under this act being temporary, shall be exempt from civil service examina-

tion and exempt from the provisions of the civil service law and rules.

(e) The secretary shall, subject to the limitations herein contained, and the rules and regulations of the board, enforce the provisions of this act, but no official act shall be taken, rule or regulation promulgated, or official order made or enforced with respect to the provisions of this act, without the approval of the majority of the members of the board.

(f) The principal office of the board shall be in the city of Trenton in rooms assigned, furnished and equipped by the custodian of the State House.

(g) Two members of the board shall constitute a quorum.

## Article III

### General powers

1. The milk control board is hereby declared to be the instrumentality of the State for the purpose of attaining the ends in this act declared, and is hereby vested with power:

(a) To supervise and regulate the entire milk industry of the State of New Jersey, including the production, importation, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the State of New Jersey, in those matters as in the declaration of legislative policy and intent stated in this act to be necessary to control or prevent unfair, unjust, destructive and demoralizing practices which are likely to result in the undermining of health regulations and standards, the demoralization of agricultural interests in this State engaged in the production of milk; *provided, however,* that nothing contained in this act or rules or regulations adopted thereunder shall be construed to abrogate or affect the status, force or operation of any public health law, any sanitary regulation or any local health ordinance, code or regulation, or an act entitled "An act to secure the purity of foods, beverages, confectionery, condiments, drugs and medicines, and to prevent deception in the distribution and sales there-

of" (Revision of 1907), approved May twentieth, one thousand nine hundred and seven, and amendments thereof and supplements thereto.

(b) To investigate all matters pertaining to the production, importation, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the State of New Jersey. The board shall have the power to issue subpœnas to compel the attendance of witnesses and the production of books, papers and records for the purpose of obtaining such information as may be required to carry out the provisions of this act. Such subpœnas shall be signed by the secretary or by any member of the board.

(c) The process of subpœna authorized in the last preceding section shall be served in the same manner and be of the same force and effect as like process in civil actions in the Supreme Court; and any person attending in pursuance of such subpœna shall be entitled to the same fees and mileage as witnesses in civil actions in said Supreme Court.

(d) In case any person so summoned by subpœna issued by said secretary or member of the board, as aforesaid, shall refuse to obey such subpœna or any directions therein, or to give testimony, or to answer questions as required, or to produce any books, papers, documents or records as required, or in case any such person shall refuse to obey any order made by any Supreme Court justice, it shall be lawful for such board, or any member thereof, including the secretary, upon affidavits proving the facts, to apply to said Justice of the Supreme Court for attachment against such person, as for a contempt, and it shall be the duty of such justice to hear such application, and if satisfactory proof be made of such refusal, to issue an attachment, directed to the sheriff or any constable of the county, for the arrest of such person, and, upon his being brought before him, to proceed to a hearing of the case; and the said justice shall have power to enforce, by imprisonment in any county jail, obedience to such subpœna, and the answer of any question that may be proper, and the production of any book, paper or document that

the witness would be compelled to produce in a court of law, by similar process, and also to compel such witness to pay the costs of said proceedings, to be taxed by the court; and any person who shall willfully and corruptly testify falsely to any material matter upon oath or affirmation administered by any member of such board or its secretary, upon such investigation or inquiry, shall be guilty of perjury.

(e) Any member of such board, or the secretary, is hereby authorized to administer oaths to all such witnesses as may appear or be brought before said board.

(f) The board may act as mediator and arbitrator in any controversy or issue that may arise among or between milk producers and milk dealers as between themselves or that may arise between them as groups.

(g) The operation and effect of any provision of this act conferring a general power upon the board shall not be impaired or qualified by the granting to the board by this act of a specific power or powers, not inconsistent with the proviso contained in paragraph (a) of this article.

## Article IV

### Rules and Orders

1. (a) The board may adopt and enforce all rules and orders necessary to carry out the provisions of this act. Every rule or order of the board shall be posted for public inspection in the main office of the board and a certified copy filed in the office of the Secretary of State. An order applying only to a person or persons named therein shall be served on the person or persons affected. Such order so required to be served shall be served by personal delivery of a certified copy or by mailing a copy thereof by mail to each person affected thereby to the last known address, which letter may or may not be registered as determined by the board, and in the case of a corporation, to any officer or agent of the corporation upon whom a sum-

mons may be served pursuant to the provisions of an act entitled "An act concerning corporations" (Revision of 1896), and the acts amendatory thereof and supplemental thereto.

(b) The board is authorized to conduct hearings in any part of the State or may designate any member of the board so to do, which hearings shall be held pursuant to rules and regulations adopted and promulgated by the board.

(c) Any member of the board or employee designated for such purpose shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured into food products. Any member of the board or designated employee shall have power to inspect all books, papers, records or documents in any place within this State for the purpose of ascertaining facts to enable the board to administer the provisions of this act.

(d) The provisions of this article as to service of orders shall not apply to orders fixing prices of milk or cream under the provisions of this act.

## Article V

### LICENSES

1. (a) No milk dealer, as defined in this act, shall buy milk from producers or others for sale, transportation, importation, storage or manufacture, or sell, transport, import, manufacture, store or distribute milk within this State, unless such dealer be duly licensed as in this act provided, and it shall be unlawful for a milk dealer to buy milk from a dealer who is unlicensed, or to sell milk to a dealer in this State who is unlicensed, or, in any way to deal in or handle milk which he may have reason to believe has previously been dealt in or handled in violation of the provisions of this act.

The licenses required by this act are for the purpose of correcting unfair, unjust, destructive and demoralizing practices in the milk and milk products industry in this State which are likely to result in the undermining of health regulations and stand-

ards, and to prevent the demoralization of agricultural interests engaged in the production of milk in this State. The licenses required by this act shall be in addition to any other license or permit required by any law of this State, or by any ordinance of a local board of health or other body exercising the powers thereof in any municipality of this State, and shall not be considered as such a license or certificate as is contemplated by section one of Article XV of "An act concerning municipalities," approved March twenty-seventh, one thousand nine hundred and seventeen, and the acts amendatory thereof or supplemental thereto.

(b) No dealer shall distribute or sell milk in this State which is obtained from any producer or other dealer where the source is not approved by the board or where the milk has been purchased for a price less than the price fixed by the board to be paid for milk to be distributed in a given market.

(c) An application for a license to operate as a milk dealer shall be made within at least thirty days after this act takes effect and or before any person shall commence business as a milk dealer, and annually thereafter on or before the fifteenth day of June in each year, for the license year commencing July first and ending June thirtieth following. The applicant shall state the nature of the business to be conducted, the full name of the person applying for the license and if the applicant be a firm or association, the full name of each member, and if a corporation the names and addresses of all officers and directors and the name of the municipality in which the business is to be conducted; facts showing that the applicant has adequate technical personnel, adequate technical and physical facilities to conduct the business of handling milk; that he has complied with all the rules and orders of the board and such other facts with respect to the license as may be required by the said board. A license shall be granted to the applicant by the board subject to the provisions of this article, and the original or a certified copy thereof shall be conspicuously displayed by the licensee in each place of business in this State.

(d) The board, after hearing, may decline to grant a license or may suspend or revoke a license already granted when satisfied of the existence of any of the following:

(1) That a licensee has rejected, without reasonable cause, any milk purchased from a producer.

(2) That the licensee has failed to account and make payment, without reasonable cause, for any milk purchased from a producer.

(3) That the licensee has committed any act likely to undermine health regulations and standards, or has committed any act injurious to the public welfare, or to trade or commerce, or any act which may demoralize the price structure of milk or interfere with an ample supply of milk for the inhabitants of this State.

(4) Where the licensee has continued in a course of dealing of such a nature as to satisfy the board of his inability or unwillingness properly to conduct the business of receiving or selling milk.

(5) Where the licensee has been a party to a combination to fix prices contrary to the provisions of this act.

(6) Where the licensee has continued in a course of dealing of such nature as to satisfy the board of an intent to deceive or defraud customers, producers or consumers.

(7) Where there has been a failure either to keep records or to furnish the statements or information required by the board.

(e) Before declining to grant a license or conditioning or limiting a license, or suspending or revoking a license previously granted, the board shall give notice to the applicant or licensee personally, or by mail addressed to his last known address, and afford to him an opportunity to appear and be heard with respect thereto at a time and place specified in such notice. Such applicant or licensee shall have the right to be so heard in person or by attorney, and to offer evidence pertinent to the subject of the hearing, and to that end to invoke the powers of the board with respect to the compulsory attendance of witnesses and the production of books, accounts, papers, records and

documents. A duly certified copy of the order of the board upon such hearing shall be served upon the applicant or the licensee in the manner provided by Article IV of this act.

(f) Any applicant or licensee deeming himself aggrieved by any action of the board taken pursuant to this act may, within thirty days after receipt of a copy of the order of the board, apply to a Justice of the Supreme Court for a writ of certiorari, which court shall have jurisdiction to suspend, reverse, vacate or modify the orders so made by the board, and the court may, in its discretion, require the prosecutor of said writ of certiorari to execute a bond payable to the State of New Jersey, in such a sum as the court may prescribe, with sureties satisfactory to said court, conditioned for the prompt payment by the said prosecutor of all damages arising from or caused by the delay in the effectiveness or enforcement of the order complained of or in the prompt prosecution of his writ.

## Article VI

### RECORDS

1. The board may require licensees to keep the following records:

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and or cream used in the manufacture of these products. Also the quantity and volume of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk or cream or milk and cream.

(g) Such other records, and information as the board may deem necessary for the proper enforcement of this act.

(h) Each licensee shall, from time to time, as required by the rule or order of the board, make and file a verified report on forms prescribed by the board of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of this act.

(i) No licensee or other person, association or corporation shall hereafter contrary to the public interest operate in any municipality under any mutual or secret agreement, arrangement, combination contract or common understanding, with any other licensee or person, firm, association or corporation, whereby the price for fluid milk to be paid to producers in this State is fixed or reduced or the price to be paid by the consumers for such milk is fixed or increased in pursuance of such mutual or secret agreement, arrangement, combination contract or common understanding, and each such contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest and in restraint of trade and commerce, and shall subject the violator or violators to the penalty in this act prescribed.

It is the intent of the Legislature that no provisions of this act shall prevent a co-operative association or co-operative corporation which sells the milk of its members or of persons who are now under contract with such co-operative association or co-operative corporation from making collective sales or marketing milk for the producers being such members or contractees nor to prevent such co-operative association or co-operative corporations from blending the proceeds of all its or their net sales, and so paying its members or contractees.

## ARTICLE VII

### FIXING OF PRICE AND VIOLATIONS

1. The board may ascertain, determine and fix, by such investigations and proof as the emergency permits, the prices to be paid to the producer and to be charged the consumer for milk in the several municipalities or markets of this State, under varying conditions, as will best protect the supply of fresh, wholesome and sanitary milk in this State, and insure a sufficient quantity of pure and wholesome milk to the inhabitants of this State, having special regard to the health and welfare of children and be most in the public interest. The board shall take into consideration the various grades of milk produced, the varying percentages of butter fat, plant volume, seasonal production, and other conditions affecting the cost of production, cost of transportation and marketing, and the amount necessary to yield a reasonable return to the producer and to the milk dealer. It may, in its discretion, hold a public hearing or hearings in this State and invite producers, consumers, local dealers, and public health officials in this State to submit such proofs as they may desire to aid the board in making its determination hereunder.

(b) The board upon its own motion, or upon application may from time to time, upon such notice as it shall by rule and regulation determine, alter or modify any official order theretofore made with respect to the price of milk used for fluid consumption to be paid by milk dealers to producers and/or the price to be paid by consumers.

(c) It is the intent of the Legislature that the instant, whenever that may be, that the handling within the State, by a milk dealer, of milk produced outside of the State, becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this act respecting such milk so produced shall apply and the powers conferred by this act on the board shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State, by a licensed milk dealer or a milk dealer required by

this act to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the State, purchased under similar conditions, shall be unlawful and deemed a violation of this act, and for continued violations the board may apply to the Court of Chancery for its writ of injunction to restrain such further unlawful acts.

(d) Any person who shall violate any of the provisions of this act and/or the orders, rules and regulations of the board as adopted from time to time, shall be deemed guilty of a violation of the provisions of this act and shall pay a penalty of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00), and such penalty when collected shall be paid to the treasurer of the State of New Jersey and become a part of the general fund of the State of New Jersey. Any milk or cream or milk products which are the subject of the violation of this act or the orders, rules and regulations of the board, may be seized, condemned, destroyed or sold as the board or court may direct; the proceeds from such sale to be paid to the treasurer of the State of New Jersey, to abide the further order of the board or court, and if no such order is made, then to become a part of the general fund of the State of New Jersey.

(e) The board or court may, in its or their discretion, release the milk or cream or milk products as seized, or the funds derived from the sale of such milk or cream or milk products, when the requirements of this act and/or the orders, rules and regulations of the board have been complied with, and upon payment of all costs and expenses incurred by the State in any proceedings connected with such seizure or prosecution.

(f) Every district court in any city or judicial district in any county and every court of common pleas in any county wherein a district court is not located is hereby empowered upon the filing of a complaint, in writing, duly verified, which said verification when made by the secretary of the milk control board may be made upon information and belief that any person has violated any of the pro-

visions of this act, to issue process at the suit of the milk control board of the State of New Jersey as plaintiff, such process shall be in the nature of a summons and shall be returnable in not less than five nor more than fifteen days; such process shall state what provisions of the law are alleged to have been violated by the defendant or defendants, and on the return of such process or at any time to which the trial shall be adjourned, the said court shall proceed in a summary manner, without a jury, to hear testimony and to determine and give judgment in the matter without the filing of any pleadings, either for the plaintiff for the recovery of such penalty, with costs, or for the defendant, and the said court shall, if judgment be rendered for the plaintiff, cause any such defendant, who may refuse or neglect to forthwith pay the amount of the judgment rendered against him and all costs and charges incident thereto, to be committed to the county jail for any period not exceeding one hundred days; that the officers to serve and execute all process under this act shall be the officers authorized to serve and execute process in said courts.

(g) The sections and parts of sections included in this act are hereby declared to be independent sections and parts of sections; if any such section or part of section shall be held invalid, such holding shall not affect the remainder of this act, nor the context in which such part of section so held invalid may appear, excepting to the extent that an entire section or part of section may be inseparably connected in meaning and effect with the section or part of section to which such holding shall directly apply. The intention and purpose of this act as hereinbefore defined extends to the regulation of the milk marketing industry and to the control generally of milk to be sold to the inhabitants of the State of New Jersey to the full extent permitted by the constitutions of this State and of the United States as applied to legislation enacted under the emergency conditions described in this act.

## Article VIII

### SAVING CLAUSE

1. No provisions of this act shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

## Article IX

### DURATION

1. This act shall expire on the first day of July, one thousand nine hundred and thirty-five, and all books, papers and records of the New Jersey Milk Control Board hereby created shall be thereafter disposed of as the Secretary of Agriculture may prescribe.

2. This act shall take effect immediately.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1933.

No. 531

LEO NEBBIA,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## BRIEF OF THE STATE OF NEW JERSEY AS *AMICUS CURIAE.*

This matter is now before your Honorable Court on appeal of Leo Nebbia from a conviction of the Court of Appeals of the State of New York.

The offense charged in the information was a sale by Mr. Nebbia of two one-quart bottles of milk and a loaf of "Italian bread" for eighteen cents, which was conceded to be a violation of Section 213, subdivision (e) of the Agriculture and Markets Law, inasmuch as the Milk Control Board had fixed a minimum price for milk of nine cents per quart.

The State of New Jersey on May twenty-third, nineteen

hundred and thirty-three, passed a Milk Control Act, a copy of which is as follows:

Copy of Act attached hereto.

The interests of the State of New Jersey and the State of New York with respect to the Milk Control acts of the respective states are common, as the act passed by the Legislature of the State of New Jersey was copied from the act of the State of New York, and the subject matter of both acts is the same with the exception of a few minor changes. Suits are now pending in the State of New Jersey for violations of the Milk Control Act of this State, which may eventually reach the Supreme Court of the United States, and the same questions would be raised with respect to the Milk Control Act of the State of New Jersey as are now being raised in the above stated cause.

The Milk Control Act of the State of New Jersey is within the police powers of the State and these powers cannot be infringed upon by the Government.

"The Police Power is one which belongs to State Sovereignty, reserved and protected by the United States Constitution." *Citing Cooley on Constitution, Lim. 7th p.* 831.

"Police Powers are inherent in States." *Sutherland v. Miller,* 91 *S. E.* 993.

"Police Power has been defined as the power inherent in the State to prescribe within limits of the State and Federal Constitutions, reasonable regulations necessary to preserve the public order, health, safety and morals." *Tighe v. Osborne,* 131 *Atl.* 801.

The regulations as prescribed by the State of New Jersey and the State of New York, requiring the licensing of persons engaged in the business of buying or selling milk, and

to be subject to the rules and regulations of the Milk Control Boards of the respective states with regard to sanitary conditions, the price of milk, the grades of milk, the fixing of minimum prices to consumer and minimum prices to producer, are within the regulation of police powers of the state.

> "Regulation of Milk Dealers requiring the licensing of persons engaged in the business of buying milk and cream is not invalid as Class Legislation." *People v. Beakes*, 119 *N. E.* 115.

> "The reasonable regulation of business and trade is within the police power of the State, and the regulation to both the exercise and mode of exercise of business and trade, so the regulations of business, safety, health, comfort and welfare are police powers of the State." *Song Hing v. Crowley*, 113 *U. S.* 708; *Gundling v. Chicago*, 177 *U. S.* 188; *St. Louis v. Illinois*, 185 *U. S.* 207; *Holden v. Hardy*, 169 *U. S.* 395.

The Milk Control Act of the State of New Jersey was created as an emergency measure and emergency measures have been held constitutional. Where an emergency arose after the war, resulting in burdensome rental conditions, emergency rent laws, temporary in their nature, were upheld. *Block v. Hirsch*, 256 *U. S.* 135.

The Milk business is subject to some measure of public regulation and the production of milk is, on account of its great importance as human food, a chief industry of the State of New Jersey, and is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depend upon it. This milk is sold by farmers to milk dealers, and then by milk dealers to consumers, and the State of New Jersey seeks to protect the farmer by fixing a minimum price for his milk, by keeping open the stream of milk flowing from the farm to the city; by guarding the farmer from

a loss in the production of his milk, and at the same time the State places a minimum price upon the sale of milk from the milk dealer to the consumer which assures the public of a high quality product at a reasonable price.

## Economic Gain to Dairy Farmers in New Jersey

Comparing the farm price of milk during the four months immediately preceding the operations of the Milk Control Board with the four months when the farm price of milk was regulated by the Board we find that New Jersey dairy farmers were benefited greatly by the regulations of the Milk Control Board. In the following table comparison is given between the prices received by New Jersey dairy farmers before and after the Milk Control Board began to function:

### Average Price Received by New Jersey Farmers for 100 Pounds of Milk
### 1933

February, $1.32; March, $1.26; April, $1.31; May, $1.31; June, $2.02; July, $2.13; August, $2.11, and September, $2.53.

The New Jersey Milk Control Board began to operate in June. In May, when prices were not regulated, New Jersey dairy farmers received an average price of $1.31 per hundred pounds. In June, when the Board started to operate, the average price was equal to $2.02, or 54% above the price in May.

The average price received by New Jersey dairy farmers during the four months from February to May inclusive was $1.30 per hundred pounds. The average farm price during the next four months, i. e. when the Milk Control Board regulated the price was $2.27, or 75% higher than during the four preceding months.

The average July 1930-1932 price of milk was $1.92 per hundred pounds. It includes the year 1930 when the price received by farmers was reasonable, i. e. $2.42 for one hundred pounds. The average farm price of milk during July, 1933, was $2.13, or 21 cents above the July 1930-1932 price. From this brief statistical summary the financial advantages to New Jersey farmers are apparent.

A present determination of the question of the constitutionality of the Milk Control Act of the State of New Jersey is of great importance to the State of New Jersey as bearing on the State of New Jersey's future policy and practice under this act.

We respectfully submit that the Milk Control Act is constitutional and that the judgment in the above stated cause should be affirmed.

Respectfully submitted,

WILLIAM A. STEVENS,
Attorney-General,

ROBERT PEACOCK,
Assistant Attorney-General,
*Counsel for State of New Jersey.*

November 22, 1933.

STATE OF NEW JERSEY

# Milk Control Board

## CHAPTER 169, LAWS OF 1933

An Act to Regulate and Control the Purchase, Distribution and Sale of Fluid Milk and Cream and to Create a State Board of Milk Control

Trenton, N. J. May, 1933

## STATE OF NEW JERSEY

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## CHAPTER 169, LAWS OF 1933

AN ACT to regulate and control the purchase, distribution and sale of fluid milk and cream and to declare an emergency, and for this purpose to create a State board of milk control, defining its powers and duties and providing penalties for violations.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

DECLARATION OF LEGISLATIVE POLICY AND INTENT

WHEREAS, During the past six months groups of producers of milk in many sections of the United States have joined together and have adopted various means or methods to control the production, sale and distribution of fluid milk, which, in their opinion, would force a better return to the milk producers, and some of the means adopted consisted of milk strikes, refusal to permit milk to be delivered to distributors and consumers, destruction and dumping of milk, and picketing, to prevent the delivery of milk to distributors and consumers; and

WHEREAS, In many communities these methods have been pursued to the extent that the public were denied a sufficient supply of good wholesome milk; and

WHEREAS, In certain sections of this nation ner, markets are not available for the local proped with the result that fluid milk is being New into the State of New Jersey and into price York and Philadelphia milk sheds at the resi- that the producers who supply milk

dents of this State are now unable to receive such a return for their milk that will reimburse them for the actual cost of production of good clean milk; and

WHEREAS, Efforts are now being made to organize the producers in the Philadelphia and New York milk sheds, including the State of New Jersey, so as to restrict or limit the milk supply by picketing or other means, in order to force a higher price for fluid milk. In the event of such results being accomplished, the health of the citizens of this State may be seriously affected. The State of New York recognizing the seriousness of the situation has already enacted into law a measure which they believe will protect the citizens of that commonwealth; and

WHEREAS, By reason of the action of the State of New York it becomes imperative that similar precautionary measures be put into effect in this State; therefore,

1. It is declared that the Legislature of the State of New Jersey, in the exercise of the police power reserved to the States in order to protect the public health and welfare of the inhabitants of this State, does hereby declare this act to be an emergency law, necessary for the immediate preservation of the public peace, health and safety.

The reason for such necessity is that evils consisting as hereinbefore recited, of unfair, unjust, destructive and demoralizing practices are now being carried on in the production, sale and distribution of milk for human food, which are likely to result in the undermining of health regulations and standards, the demoralization of the agricultural interests of this State engaged in the production of milk, and the creation of conditions inimical to the health of milk consumers. Such conditions have progressed to the point that there is immediate danger not only to the public health, but also to the public peace and safety, and it is the intent of this act to correct those unfair, unjust, destructive and demoralizing practices.

## Article I

### Definitions

1. Words used in this act, unless otherwise expressly stated, or unless the context or subject matter otherwise requires, shall have the following meaning:

"Board"—The milk control board.

"Person"—Any individual, person, firm, association or corporation.

"Milk Dealer"—Any person who purchases for sale, produces for sale direct to consumer, purchases for distribution, distributing broker, any person who purchases, distributes or handles within or without the State, for storage, manufacture or sale in this State, except for consumption on the premises of the producer, milk and cream. Any co-operative association organized under any law of this or any other State is declared to be a milk dealer or producer within the meaning of this act as the board may determine.

"Market"—Any municipality, incorporated or unincorporated, of this State, other than a county, including any natural marketing area designated by the board.

"Licensee"—A licensed milk dealer.

"Milk"—The natural product of a dairy animal or animals, and includes such product when cooled, pasteurized, condensed or concentrated except when contained in hermetically sealed cans, with a view to being sold as milk and also cream, buttermilk and skimmed milk, sold or intended to be sold as such for human food; said term excludes the natural product of a dairy animal or animals sold or intended to be sold for any other purpose.

"Producer"—Any person producing milk and/or cream delivered or to be delivered to any dealer or to any market in this State.

"Consumer"—Any person, other than a milk dealer, who purchases milk for fluid consumption.

"Sanitary regulations"—All laws enacted by the State of New Jersey; ordinances and regulations enacted or adopted by municipalities, municipal boards of health, or municipal departments, or

officials exercising the powers and duties of local boards of health, relating to the production, handling, transportation, distribution and sale of milk within this State.

## Article II

### MILK CONTROL BOARD

1. (a) The Secretary of the Board of Agriculture, and a member of the State Board of Health to be designated by said board and a person to be appointed by the Governor are hereby constituted a milk control board for the purpose of effectuating the provisions of this act. The terms of office of the members of the board thereof shall be coincident with the terms for which they are severally appointed to the Department of Agriculture and to the board of health and the member appointed by the Governor shall serve during the pleasure of the Governor. Technical and other services for such milk control board shall be performed, so far as practicable, by forces or officers in the Department of Agriculture and when required by forces or officers in the State Department of Health, without additional compensation, but the milk control board may appoint and at pleasure remove the secretary of the milk control board, and any such additional technical, legal and other assistants and employees as may be necessary to carry out the provisions of this act and to prescribe their powers and duties.

(b) The members of the milk control board shall serve without pay, but shall, upon certification by the majority of the members of said board, be reimbursed for their actual and necessary expenses as required in the performance of their duties as prescribed by this act.

(c) The board shall fix the compensation of such appointees which, in case of the secretary, shall not exceed the sum of three thousand dollars ($3,000.00) per annum.

(d) All positions under this act being temporary, shall be exempt from civil service examina-

tion and exempt from the provisions of the civil service law and rules.

(e) The secretary shall, subject to the limitations herein contained, and the rules and regulations of the board, enforce the provisions of this act, but no official act shall be taken, rule or regulation promulgated, or official order made or enforced with respect to the provisions of this act, without the approval of the majority of the members of the board.

(f) The principal office of the board shall be in the city of Trenton in rooms assigned, furnished and equipped by the custodian of the State House.

(g) Two members of the board shall constitute a quorum.

## Article III

### General powers

1. The milk control board is hereby declared to be the instrumentality of the State for the purpose of attaining the ends in this act declared, and is hereby vested with power:

(a) To supervise and regulate the entire milk industry of the State of New Jersey, including the production, importation, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the State of New Jersey, in those matters as in the declaration of legislative policy and intent stated in this act to be necessary to control or prevent unfair, unjust, destructive and demoralizing practices which are likely to result in the undermining of health regulations and standards, the demoralization of agricultural interests in this State engaged in the production of milk; *provided, however,* that nothing contained in this act or rules or regulations adopted thereunder shall be construed to abrogate or affect the status, force or operation of any public health law, any sanitary regulation or any local health ordinance, code or regulation, or an act entitled "An act to secure the purity of foods, beverages, confectionery, condiments, drugs and medicines, and to prevent deception in the distribution and sales there-

of" (Revision of 1907), approved May twentieth, one thousand nine hundred and seven, and amendments thereof and supplements thereto.

(b) To investigate all matters pertaining to the production, importation, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the State of New Jersey. The board shall have the power to issue subpœnas to compel the attendance of witnesses and the production of books, papers and records for the purpose of obtaining such information as may be required to carry out the provisions of this act. Such subpœnas shall be signed by the secretary or by any member of the board.

(c) The process of subpœna authorized in the last preceding section shall be served in the same manner and be of the same force and effect as like process in civil actions in the Supreme Court; and any person attending in pursuance of such subpœna shall be entitled to the same fees and mileage as witnesses in civil actions in said Supreme Court.

(d) In case any person so summoned by subpœna issued by said secretary or member of the board, as aforesaid, shall refuse to obey such subpœna or any directions therein, or to give testimony, or to answer questions as required, or to produce any books, papers, documents or records as required, or in case any such person shall refuse to obey any order made by any Supreme Court justice, it shall be lawful for such board, or any member thereof, including the secretary, upon affidavits proving the facts, to apply to said Justice of the Supreme Court for attachment against such person, as for a contempt, and it shall be the duty of such justice to hear such application, and if satisfactory proof be made of such refusal, to issue an attachment, directed to the sheriff or any constable of the county, for the arrest of such person, and, upon his being brought before him, to proceed to a hearing of the case; and the said justice shall have power to enforce, by imprisonment in any county jail, obedience to such subpœna, and the answer of any question that may be proper, and the production of any book, paper or document that

the witness would be compelled to produce in a court of law, by similar process, and also to compel such witness to pay the costs of said proceedings, to be taxed by the court; and any person who shall willfully and corruptly testify falsely to any material matter upon oath or affirmation administered by any member of such board or its secretary, upon such investigation or inquiry, shall be guilty of perjury.

(e) Any member of such board, or the secretary, is hereby authorized to administer oaths to all such witnesses as may appear or be brought before said board.

(f) The board may act as mediator and arbitrator in any controversy or issue that may arise among or between milk producers and milk dealers as between themselves or that may arise between them as groups.

(g) The operation and effect of any provision of this act conferring a general power upon the board shall not be impaired or qualified by the granting to the board by this act of a specific power or powers, not inconsistent with the proviso contained in paragraph (a) of this article.

## ARTICLE IV

### RULES AND ORDERS

1. (a) The board may adopt and enforce all rules and orders necessary to carry out the provisions of this act. Every rule or order of the board shall be posted for public inspection in the main office of the board and a certified copy filed in the office of the Secretary of State. An order applying only to a person or persons named therein shall be served on the person or persons affected. Such order so required to be served shall be served by personal delivery of a certified copy or by mailing a copy thereof by mail to each person affected thereby to the last known address, which letter may or may not be registered as determined by the board, and in the case of a corporation, to any officer or agent of the corporation upon whom a sum-

mons may be served pursuant to the provisions of an act entitled "An act concerning corporations" (Revision of 1896), and the acts amendatory thereof and supplemental thereto.

(b) The board is authorized to conduct hearings in any part of the State or may designate any member of the board so to do, which hearings shall be held pursuant to rules and regulations adopted and promulgated by the board.

(c) Any member of the board or employee designated for such purpose shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured into food products. Any member of the board or designated employee shall have power to inspect all books, papers, records or documents in any place within this State for the purpose of ascertaining facts to enable the board to administer the provisions of this act.

(d) The provisions of this article as to service of orders shall not apply to orders fixing prices of milk or cream under the provisions of this act.

## Article V

### LICENSES

1. (a) No milk dealer, as defined in this act, shall buy milk from producers or others for sale, transportation, importation, storage or manufacture, or sell, transport, import, manufacture, store or distribute milk within this State, unless such dealer be duly licensed as in this act provided, and it shall be unlawful for a milk dealer to buy milk from a dealer who is unlicensed, or to sell milk to a dealer in this State who is unlicensed, or, in any way to deal in or handle milk which he may have reason to believe has previously been dealt in or handled in violation of the provisions of this act.

The licenses required by this act are for the purpose of correcting unfair, unjust, destructive and demoralizing practices in the milk and milk products industry in this State which are likely to result in the undermining of health regulations and stand-

ards, and to prevent the demoralization of agricultural interests engaged in the production of milk in this State. The licenses required by this act shall be in addition to any other license or permit required by any law of this State, or by any ordinance of a local board of health or other body exercising the powers thereof in any municipality of this State, and shall not be considered as such a license or certificate as is contemplated by section one of Article XV of "An act concerning municipalities," approved March twenty-seventh, one thousand nine hundred and seventeen, and the acts amendatory thereof or supplemental thereto.

(b) No dealer shall distribute or sell milk in this State which is obtained from any producer or other dealer where the source is not approved by the board or where the milk has been purchased for a price less than the price fixed by the board to be paid for milk to be distributed in a given market.

(c) An application for a license to operate as a milk dealer shall be made within at least thirty days after this act takes effect and or before any person shall commence business as a milk dealer, and annually thereafter on or before the fifteenth day of June in each year, for the license year commencing July first and ending June thirtieth following. The applicant shall state the nature of the business to be conducted, the full name of the person applying for the license and if the applicant be a firm or association, the full name of each member, and if a corporation the names and addresses of all officers and directors and the name of the municipality in which the business is to be conducted; facts showing that the applicant has adequate technical personnel, adequate technical and physical facilities to conduct the business of handling milk; that he has complied with all the rules and orders of the board and such other facts with respect to the license as may be required by the said board. A license shall be granted to the applicant by the board subject to the provisions of this article, and the original or a certified copy thereof shall be conspicuously displayed by the licensee in each place of business in this State.

(d) The board, after hearing, may decline to grant a license or may suspend or revoke a license already granted when satisfied of the existence of any of the following:

(1) That a licensee has rejected, without reasonable cause, any milk purchased from a producer.

(2) That the licensee has failed to account and make payment, without reasonable cause, for any milk purchased from a producer.

(3) That the licensee has committed any act likely to undermine health regulations and standards, or has committed any act injurious to the public welfare, or to trade or commerce, or any act which may demoralize the price structure of milk or interfere with an ample supply of milk for the inhabitants of this State.

(4) Where the licensee has continued in a course of dealing of such a nature as to satisfy the board of his inability or unwillingness properly to conduct the business of receiving or selling milk.

(5) Where the licensee has been a party to a combination to fix prices contrary to the provisions of this act.

(6) Where the licensee has continued in a course of dealing of such nature as to satisfy the board of an intent to deceive or defraud customers, producers or consumers.

(7) Where there has been a failure either to keep records or to furnish the statements or information required by the board.

(e) Before declining to grant a license or conditioning or limiting a license, or suspending or revoking a license previously granted, the board shall give notice to the applicant or licensee personally, or by mail addressed to his last known address, and afford to him an opportunity to appear and be heard with respect thereto at a time and place specified in such notice. Such applicant or licensee shall have the right to be so heard in person or by attorney, and to offer evidence pertinent to the subject of the hearing, and to that end to invoke the powers of the board with respect to the compulsory attendance of witnesses and the production of books, accounts, papers, records and

documents. A duly certified copy of the order of the board upon such hearing shall be served upon the applicant or the licensee in the manner provided by Article IV of this act.

(f) Any applicant or licensee deeming himself aggrieved by any action of the board taken pursuant to this act may, within thirty days after receipt of a copy of the order of the board, apply to a Justice of the Supreme Court for a writ of certiorari, which court shall have jurisdiction to suspend, reverse, vacate or modify the orders so made by the board, and the court may, in its discretion, require the prosecutor of said writ of certiorari to execute a bond payable to the State of New Jersey, in such a sum as the court may prescribe, with sureties satisfactory to said court, conditioned for the prompt payment by the said prosecutor of all damages arising from or caused by the delay in the effectiveness or enforcement of the order complained of or in the prompt prosecution of his writ.

## Article VI

### Records

1. The board may require licensees to keep the following records:

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the manufacture of these products. Also the quantity and volume of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk or cream or milk and cream.

(g) Such other records, and information as the board may deem necessary for the proper enforcement of this act.

(h) Each licensee shall, from time to time, as required by the rule or order of the board, make and file a verified report on forms prescribed by the board of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of this act.

(i) No licensee or other person, association or corporation shall hereafter contrary to the public interest operate in any municipality under any mutual or secret agreement, arrangement, combination contract or common understanding, with any other licensee or person, firm, association or corporation, whereby the price for fluid milk to be paid to producers in this State is fixed or reduced or the price to be paid by the consumers for such milk is fixed or increased in pursuance of such mutual or secret agreement, arrangement, combination contract or common understanding, and each such contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest and in restraint of trade and commerce, and shall subject the violator or violators to the penalty in this act prescribed:

It is the intent of the Legislature that no provisions of this act shall prevent a co-operative association or co-operative corporation which sells the milk of its members or of persons who are now under contract with such co-operative association or co-operative corporation from making collective sales or marketing milk for the producers being such members or contractees nor to prevent such co-operative association or co-operative corporations from blending the proceeds of all its or their net sales, and so paying its members or contractees.

## Article VII

### FIXING OF PRICE AND VIOLATIONS

1. The board may ascertain, determine and fix, by such investigations and proof as the emergency permits, the prices to be paid to the producer and to be charged the consumer for milk in the several municipalities or markets of this State, under varying conditions, as will best protect the supply of fresh, wholesome and sanitary milk in this State, and insure a sufficient quantity of pure and wholesome milk to the inhabitants of this State, having special regard to the health and welfare of children and be most in the public interest. The board shall take into consideration the various grades of milk produced, the varying percentages of butter fat, plant volume, seasonal production, and other conditions affecting the cost of production, cost of transportation and marketing, and the amount necessary to yield a reasonable return to the producer and to the milk dealer. It may, in its discretion, hold a public hearing or hearings in this State and invite producers, consumers, local dealers, and public health officials in this State to submit such proofs as they may desire to aid the board in making its determination hereunder.

(b) The board upon its own motion, or upon application may from time to time, upon such notice as it shall by rule and regulation determine, alter or modify any official order theretofore made with respect to the price of milk used for fluid consumption to be paid by milk dealers to producers and/or the price to be paid by consumers.

(c) It is the intent of the Legislature that the instant, whenever that may be, that the handling within the State, by a milk dealer, of milk produced outside of the State, becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this act respecting such milk so produced shall apply and the powers conferred by this act on the board shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State, by a licensed milk dealer or a milk dealer required by

this act to be licensed, of any such milk purchased from the producer at a price lower w[redacted] than that required to be paid for milk produced within the State, purchased under similar conditions, shall be unlawful and deemed a violation of this act, and for continued violations the board may apply to the Court of Chancery for its writ of injunction to restrain such further unlawful acts.

(d) Any person who shall violate any of the provisions of this act and/or the orders, rules and regulations of the board as adopted from time to time, shall be deemed guilty of a violation of the provisions of this act and shall pay a penalty of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00), and such penalty when collected shall be paid to the treasurer of the State of New Jersey and become a part of the general fund of the State of New Jersey. Any milk or cream or milk products which are the subject of the violation of this act or the orders, rules and regulations of the board, may be seized, condemned, destroyed or sold as the board or court may direct; the proceeds from such sale to be paid to the treasurer of the State of New Jersey, to abide the further order of the board or court, and if no such order is made, then to become a part of the general fund of the State of New Jersey.

(e) The board or court may, in its or their discretion, release the milk or cream or milk products as seized, or the funds derived from the sale of such milk or cream or milk products, when the requirements of this act and/or the orders, rules and regulations of the board have been complied with, and upon payment of all costs and expenses incurred by the State in any proceedings connected with such seizure or prosecution.

(f) Every district court in any city or judicial district in any county and every court of common pleas in any county wherein a district court is not located is hereby empowered upon the filing of a complaint, in writing, duly verified, which said verification when made by the secretary of the milk control board may be made upon information and belief that any person has violated any of the pro-

visions of this act, to issue process at the suit of the milk control board of the State of New Jersey as plaintiff, such process shall be in the nature of a summons and shall be returnable in not less than five nor more than fifteen days; such process shall state what provisions of the law are alleged to have been violated by the defendant or defendants, and on the return of such process or at any time to which the trial shall be adjourned, the said court shall proceed in a summary manner, without a jury, to hear testimony and to determine and give judgment in the matter without the filing of any pleadings, either for the plaintiff for the recovery of such penalty, with costs, or for the defendant, and the said court shall, if judgment be rendered for the plaintiff, cause any such defendant, who may refuse or neglect to forthwith pay the amount of the judgment rendered against him and all costs and charges incident thereto, to be committed to the county jail for any period not exceeding one hundred days; that the officers to serve and execute all process under this act shall be the officers authorized to serve and execute process in said courts.

(g) The sections and parts of sections included in this act are hereby declared to be independent sections and parts of sections; if any such section or part of section shall be held invalid, such holding shall not affect the remainder of this act, nor the context in which such part of section so held invalid may appear, excepting to the extent that an entire section or part of section may be inseparably connected in meaning and effect with the section or part of section to which such holding shall directly apply. The intention and purpose of this act as hereinbefore defined extends to the regulation of the milk marketing industry and to the control generally of milk to be sold to the inhabitants of the State of New Jersey to the full extent permitted by the constitutions of this State and of the United States as applied to legislation enacted under the emergency conditions described in this act.

## Article VIII

### SAVING CLAUSE

1. No provisions of this act shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

## Article IX

### DURATION

1. This act shall expire on the first day of July, one thousand nine hundred and thirty-five, and all books, papers and records of the New Jersey Milk Control Board hereby created shall be thereafter disposed of as the Secretary of Agriculture may prescribe.

2. This act shall take effect immediately.

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No. 531

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1933

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LEO NEBBIA, *Appellant,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK, *Appellee,*

---

APPEAL FROM THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK.

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## BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT AS AMICUS CURIAE.

WARREN B. BURROWS,
*Attorney General;*
ERNEST L. AVERILL,
*Deputy Attorney General;*
H. ROGER JONES,
WILLIAM H. NELSON,
*Assistant Attorneys General.*

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

## SUBJECT INDEX


| | | Page |
|---|---|---|
| STATEMENT | | 1 |
| SUMMARY OF CONNECTICUT MILK CONTROL ACT | | 5 |
| ARGUMENT | | 9 |
| I. | It may be fairly said without fear of contradiction that the Production and Distribution of Milk is a Paramount Industry in both New York and Connecticut and one upon which the prosperity of both these states in large measure depends. General Discussion of the Constitutionality of the New York and Connecticut Milk Control Acts | 9 |
| II. | The New York Milk Control Act would undoubtedly be sustained if the Court were satisfied that its purpose was solely or primarily to protect the public health and that a price fixing regulation was necessary to insure the continuance of an adequate supply of pure milk | 13 |
| III. | The statute may be upheld, inasmuch as it is to remain in force for a limited period only; First, as a Health Measure, on the ground of the elemental necessity of an adequate and sanitary milk supply to the public health; and Second, on the ground that such regulation of the milk business, as a business affected with a public use or interest, is a necessary exercise of the police power in an emergency for the public welfare | 16 |
| IV. | Conditions may require the enactment of laws which might be considered arbitrary under normal conditions and although a public emergency cannot become the source of power to suspend the limitations of the Constitution; it may afford a reason for exercising a latent power of government already had but not ordinarily or previously exercised | 19 |
| V. | Conclusion | 27 |

## TABLE OF CASES CITED


| | Page |
|---|---|
| Beck *v.* Wallace, U. S. Law Week, Sept. 5, 1933, 41 Wash. Law Rep. 633 | 24 |
| Bissell *v.* Butterworth, 97 Conn. at 615 | 10 |
| Blaisdell *v.* Home Building & Loan Assn., 249 N. W. Rep. 334 | 26 |
| Block *v.* Hirsch, 256 U. S. 135 | 15, 17, 18, 19, 24 |
| Central Lumber Co. *v.* So. Dakota, 226 U. S. 157 | 20 |
| Chicago, Burlington & Quincy R. R. Co. *v.* McGuire, 219 U. S. 549, 569 | 16 |
| Crowley *v.* Christensen, 137 U. S. 86 | 12 |
| Diorio *v.* Morris, et al., Superior Court, New Haven County, Connecticut | 4 |
| Economy Dairy Co., Inc. *v.* Wallace, U. S. Law Week, Sept. 5, 1933, 41 Wash. Law Rep. 633 | 24 |
| 810 West End Ave. Inc. *v.* Stern, 258 U. S. 242 | 17 |
| Fort Smith & Western R. R. *v.* Mills, 253 U. S. 206 | 19 |
| German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389 | 20 |
| Levy Leasing Co. *v.* Seigel, 258 U. S. 242 | 17 |
| Liebermann *v.* Van de Carr, 199 U. S. at p. 558 | 14 |
| Marcus Brown Holding Co. *v.* Feldman, 256 U. S. 170 | 17 |
| Munn *v.* Illinois, 94 U. S. 113 | 19 |
| New State Ice Co. *v.* Liebman, 285 U. S. 262 | 20, 22, 23, 24 |
| O'Gorman & Young Inc. *v.* Hartford Fire Ins. Co., 282 U. S. 251 | 17, 20 |
| People *v.* Peretta, 253 N. Y. 305 | 14 |
| Payne *v.* Kansas, 248 U. S. 112 | 15 |
| Shelton *v.* City of Shelton, 111 Conn., 433 | 11, 14 |
| Southport Petroleum Co. *v.* Ickes, U. S. L. J. of Aug. 22, 1933, 41 Wash. Law Rep. 577 | 26 |
| Tagg Bros. & Moorhead *v.* U. S., 280 U. S. 420 | 20 |
| Tyson *v.* Banton, 273 U. S. 418 | 21 |
| U. S. and Wallace *v.* Calistan Packers, Inc. U. S. Law Week, Oct. 10, 1933 | 25 |
| Wilson *v.* New, 243 U. S. 332 | 19, 20 |
| Young *v.* Lemieux, 79 Conn. 434, 440 | 12 |

## TABLE OF STATUTES CITED


| | Page |
|---|---|
| Conn. Milk Control Act, Ch. 107a Cumulative Supplement to Conn. General Statutes 1931-1933 (Ch. 226 Public Acts 1933) | 1, 28 |
| Conn. General Statutes Revision of 1930—Chapter 135 | 6 |
| Conn. General Statutes Revision of 1930—Chapter 194 | 33 |
| New York Milk Control Act, Chapter 159 N. Y. Laws 1933 | 1 |


## TABLE OF TEXT WRITERS CITED


| | |
|---|---|
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| Pitcher Committee of the N. Y. Legislature, Report of | 24 |
| Yale Law Journal—Vol. 42, p. 1259 | 24 |


## APPENDIX


| | |
|---|---|
| Connecticut Milk Control Act, Chapter 107a Cumulative Supplement to Conn. General Statutes 1931-1933 (Ch. 226 Public Acts 1933) | 28 |

IN THE

# Supreme Court of the United States

## No. 531

OCTOBER TERM, 1933

LEO NEBBIA, *Appellant,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK, *Appellee,*

APPEAL FROM THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK.

## STATEMENT.

The State of Connecticut at the 1933 session of its General Assembly passed an Act entitled—"An Act Creating a Board of Milk Control", Chapter 226 of the Public Acts of Connecticut of 1933, that in many respects is very similar to the New York Milk Control Act, Chapter 159, New York Laws of 1933, and in principle the same. The full text of the Connecticut Milk Control Act is appended to this brief.

The Connecticut Milk Control Board has held a large number of hearings for the purpose of gathering necessary information, established a licensing system for milk dealers and a scale of prices by regulations

made from time to time, the latest of which is as follows:

STATE OF CONNECTICUT

## BOARD OF MILK CONTROL

*Schedule of Milk Prices Established by the Milk Control Board for the State of Connecticut Effective for all milk bought and sold within the State on and after 12:01 A. M. (standard time) August 10, 1933*

| | Milk Dealers to Consumers Retail | Milk Dealers to Stores and Wholesale | Stores to Consumers Cash and Carry |
|---|---|---|---|
| MILK: (Raw or pasteurized) | | | |
| Quart bottles | .14 | .11½ | .13 |
| Pint bottles | .09 | .07 | .08 |
| ½ pint bottles | .. | .04 | .. |
| 10 oz. bottles | .. | .05 | .. |
| Bulk | .. | .11 | .. |
| Bulk, 40 quarts or over | .. | .10½ | .. |
| GRADE A MILK: (Raw or pasteurized) | | | |
| Quart bottles | .17 | .14½ | .16 |
| Pint bottles | .11 | .09 | .10 |
| ½ pint bottles | .. | .05 | .. |
| 10 oz. bottles | .. | .06 | .. |
| Bulk | .. | .12½ | .. |
| Bulk, 40 quarts or over | .. | .12 | .. |
| HEAVY CREAM, at least 36% | | | |
| Quart bottles | .75 | .60 | .70 |
| Pint bottles | .40 | .32 | .38 |
| ½ pint bottles | .21 | .18 | .20 |
| Bulk, less than 40 quarts | .. | .50 | .. |
| Bulk, over 40 quarts | .. | .47 | .. |
| Sour cream only, 12 oz. bottles | .30 | .25 | .28 |

| | | | |
|---|---|---|---|
| MEDIUM CREAM, at least 26% | | | |
| Quart bottles | .60 | .50 | .55 |
| Pint bottles | .34 | .28 | .32 |
| ½ pint bottles | .18 | .15 | .17 |
| Bulk, less than 40 quarts | .. | .40 | .. |
| Bulk, over 40 quarts | .. | .37 | .. |
| Sour cream only, 12 oz. bottles | .26 | .21 | .24 |
| LIGHT CREAM, at least 16% | | | |
| Quart bottles | .45 | .35 | .40 |
| Pint bottles | .25 | .20 | .23 |
| ½ pint bottles | .15 | .12 | .14 |
| Bulk, less than 40 quarts | .. | .30 | .. |
| Bulk, over 40 quarts | .. | .28 | .. |
| Sour cream only, 12 oz. bottles | .20 | .16 | .18 |
| BUTTERMILK | | | |
| Quart bottles | .10 | .08 | .09 |
| Pint bottles | .07 | .05 | .06 |
| ½ pint bottles | .. | .03 | .. |
| 10 oz. bottles | .. | .04 | .. |
| Bulk, less than 40 quarts | .. | .07 | .. |
| Bulk, 40 quarts or over | .. | .06½ | .. |

The minimum price of Grade B or market milk in Class 1 is set at 7¾ cents at the dealer's plant modified by transportation charges, fat differentials and other hitherto established charges and credits unchanged in any respect, until modified by a public ruling of the Board. This price is equally binding on the producer and the dealer.

Sour Cream shall sell for the same prices as sweet cream for a like butterfat content.

All milk dealers shall require all stores to pay five cents deposit on each bottle delivered to them.

On dealer's bills to wholesale customers, a discount of 2% off for cash may be allowed as follows, and not otherwise: On monthly bills paid in full on or before the tenth day of the month succeeding the purchases; on weekly bills paid in full within ten days of the first purchase; on spot cash transactions.

All other discounts, rebates, free products, premiums, or other methods of price evasion shall be eliminated. This includes discounts to employees who will pay regular retail prices.

All sales by dealers from their plants direct to consumers shall be charged at the cash and carry price.

Milk sold as Charity Milk shall be paid for by the dealer to the producer at the Class 1 price.

The Board of Milk Control has in some instances revoked licenses and in others instituted prosecutions for violations of the Act. The constitutionality of the Connecticut Act has not been passed upon in any of the higher courts of the State except in the case *Diorio v. Morris,* where Judge Ells of the Superior Court of Connecticut denied an injunction seeking to restrain on constitutional grounds the Board of Milk Control from putting its price schedule into effect. Although not basing his decision on constitutional grounds, Judge Ells in that case expressed the opinion that the Connecticut Act was constitutional.

The Supreme Court of Connecticut has not passed upon the constitutionality of the Act and there are no cases involving its constitutionality pending before that Court at the present time.

## Summary of the Connecticut Milk Control Act

The Connecticut Act (Sec. 2) provides for the appointment of a board of milk control by the Governor whose term of office shall be only until and including June 30, 1935. The purposes of the Act, it is stated, (Sec. 4) are to be achieved as far as possible by promoting, encouraging and fostering cooperation among milk producers and dealers and between producers and dealers, and by promoting a more equitable distribution of the burden of the surplus of milk and the elimination of unfair and demoralizing trade practices. The Board of Milk Control is given power (Sec. 5) to investigate and regulate the milk industry in this State, including production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products; but it is specifically provided that the Act does not interfere with or relieve other officers of the State from their duties in accordance with existing statutes, nor alter the requirements as to the standard of milk and its products or their production. The Board is further given the power of subpoena and in case there is a failure to observe any such subpoena, has the power of making application to the Superior Court for an order requiring witnesses to appear and answer questions material to investigations made by the Board. The Board also has power to require reports as to the quantities and sources of milk and milk products and quantities sold, together with prices paid or received and such other information as the Board may deem necessary. It has also the power to act as investigator and to find, report and publish facts ascertained by it on complaints made by producers, dealers or consumers in regard to contracts, agreements and practices alleged

to be unethical and unfair to the industry; the findings of the Board, on such complaints by agreement of parties in advance of hearing to become final and binding. Such investigations may also be made by the Board on its own initiative and reported to the Governor, such reports being public documents.

The Board is given power (Sec. 6) to fix and establish from time to time a minimum price for the different markets of the State for each class of milk to be paid to producers; to be paid by consumers; to be paid to dealers by wholesale purchasers; and to be paid to stores by consumers.

Milk dealers are required to be licensed by the Board (Sec. 7) and no person shall distribute or sell milk within the State unless licensed as provided in the Act; nor shall any person licensed sell or offer for sale any milk or cream to any unlicensed dealer in the State if such other dealer under the provisions of the Act should be licensed. Applications for such licenses are required to be made to the Board in writing by all those who were in the business of selling milk at the time of the passage of the Act. After July 1st, 1933 persons before engaging in the business of milk dealer shall file an application to be licensed. The Board is given the authority to refuse a license to an applicant or revoke the license of a licensee if the applicant or licensee has not complied with and is not prepared to comply with the provisions of Chapter 135 of the General Statutes and the rules and regulations set up by said Chapter by the milk regulation board. (Chapter 135 of the General Statutes is the pure food and drug act and portions of

said Chapter deal with various phases of milk production and milk products and establish a milk regulation board with power in said milk regulation board of establishing and putting into force rules and regulations in connection with the inspection of dairies and the production, care, handling, marketing and sale of milk and cream within the State to protect the public from the use of milk or cream which is insanitary or detrimental to the public health.) Licenses may also be refused or revoked where the applicant or licensee has refused, without reasonable cause, milk agreed to be purchased from a producer; or where the applicant or licensee has failed, without reasonable cause, to account and make payment for milk so purchased; or where a general assignment for the benefit of creditors has been made or the applicant or licensee has been adjudged a bankrupt, unless a bond in satisfactory amount is furnished establishing adequate proof of ability to pay for milk purchased; that the applicant or licensee is engaged in unfair practices such as giving milk with other purchases or allowing rebates other than ordinary trade discounts; that the applicant or licensee has failed to keep records or furnish statements required by the Board under the provisions of the Act; and that the applicant or licensee has failed to comply with minimum prices fixed by the Board under authority of this Act.

The applicant for a license (Sec. 8) shall state the amount of milk usually distributed or sold or proposed to be distributed or sold as a daily average and thus establish the basis for the fee for each license. The first license period is to June 4, 1934 and the following

license period is from July 1, 1934 to and including June 30, 1935.

The method of appeal by any person aggrieved by any action of the Board is provided for (Sec. 9) and the Board is required to act upon applications for licenses within twenty days from their receipt (Sec. 10).

The provisions of the Act shall not revoke or abridge any existing contract of any cooperative organization engaged in making collection sales or marketing of milk for the producers thereof, or affect any contract between a non-resident milk dealer and a resident milk producer or a resident milk dealer and a non-resident milk producer, or prevent the giving of milk for charity or milk to be distributed to needy persons for charitable relief or the furnishing of milk for charitable purposes at a price below that fixed by the Board.

The Board is given authority to make and revise rules and regulations from time to time as may be necessary for the administration of the Act, such regulation to state its effective date and a copy to be filed in the office of the Secretary of State, each regulation to be published in such manner as the Board may determine (Sec. 13).

A penalty for violation of the Act of a fine not exceeding five hundred dollars or imprisonment for not more than one year, or both, is provided (Sec. 15).

## ARGUMENT.

### I.

**It may be fairly said without fear of contradiction that the Production and Distribution of Milk is a Paramount Industry in both New York and Connecticut and one upon which the prosperity of both these states in a large measure depends. General Discussion of the Constitutionality of the New York and Connecticut Milk Control Acts.**

The foregoing statement of fact is not questioned and as to the State of New York, it is conceded, as is clearly indicated by the opinions in the New York Court of Appeals in this case. Consumers in this country annually pay approximately four billion dollars for dairy products. The income to the farmer is normally greater from this source than from any other branch of farming.

> *Bartlett, Cooperation in Marketing Dairy Products* (1931) 1, 2.

New York ranks third among the States in the production of milk and second in the value of dairy products.

> *New York Agri. Bull.* (1932) No. 267, 125.

From the terms of both the Connecticut and New York Acts, it may readily be seen that they are in the nature of emergency legislation and their purpose is to deal, for a temporary period only, with the commonly known chaotic condition of the milk industry in both the States of Connecticut and New York. In its present form this legislation is absolutely limited to a period not extending beyond March 31, 1934 in New York and

June 30, 1935 in Connecticut, and primarily its expressed purposes are to protect the public health and welfare and to that end to promote, encourage and foster cooperation among milk dealers and between milk producers and milk dealers, and to eliminate unfair and demoralizing trade practices in the production, sale and distribution of milk and milk products, whereby the dairy industry in both these States and the constant supply of pure milk to their inhabitants are imperiled. There is also the thought of promoting a more equitable distribution of the burden of the milk surplus. By these purposes as expressed in this legislation the Legislatures of both States recognized existing conditions and sought to create a state agency for a limited period with specified powers to meet the emergency and so far as possible eliminate or assist in eliminating the existing conditions creating the emergency.

A statute must be construed according to the legislative intent; its subject-matter, its object and remedy; i.e., in view of its general purpose, and the legislative intent is obtained from the language used in the light of surrounding or existing circumstances. Furthermore, no mandate of a State Legislature is to be presumed or declared void unless it clearly and plainly violates the Constitution; and furthermore, any enactment of a State Legislature is to be reconciled with the Constitution, both Federal and State, if possible.

> "Every act of the legislature should be so construed as to give it force and effect to accomplish the manifest intention of the legislature."
>
> *Bissell v. Butterworth,* 97 Conn. at 615.

In a comparatively recent Connecticut case, *Shelton v. City of Shelton*, 111 Conn., 433, the Supreme Court of Errors has considered various matters concerning the regulation of the production, marketing and sale of milk, and held that such measures are clearly within the proper exercise of the police power of the State.

Therefore, where an act outlines its purposes and seeks to promote and encourage cooperation among producers and dealers in such a universal and needed food commodity as milk and to promote a more equitable distribution of the burden of milk surplus which has demoralized the milk market, and in so doing to promote the public health and welfare, as it cannot reasonably be expected that sanitary conditions in production and distribution can in such circumstances long be maintained in the case of a commodity so susceptible to contamination and deterioriation as milk, and further seeks to eliminate unfair and demoralizing trade practices in such a universal food product, with the power of investigating and regulating the industry and to provide for the licensing of persons engaged in the business, we believe that the Act comes within the police powers inherent in any sovereign state and does not contravene constitutional provisions.

The legislation in question, we believe is in the interests of public welfare and so far as any right of contract is concerned, we furthermore believe such a right is not absolute.

> "Freedom of contract is not absolute. It is subject to reasonable legislative regulation in the interests of public health, safety and morals,

and, in a sense not resting merely on expediency, the public welfare."

*Cooley on Constitutional Limitations,* 8th Ed., Vol. 2, p. 1236.

Primarily, where a situation exists proper for legislative action under the police power, the legislature is the sole and exclusive judge to what degree its power should be exercised. It is only when legislative regulation of a proper subject under the police power is carried to the point where it becomes prohibitive, destructive or confiscatory, that the reasonableness of such legislation may be considered by the courts. The foundation of the police power is the control of private interests for public welfare; therefore, a statute is not rendered unconstitutional by the mere fact that private rights of person or property are subject to restraint or that loss will result to individuals from its enforcement.

*Freund, Police Power, Section* 63; 12 C. J. 931, 933;
*Crowley v. Christensen,* 137 U. S., 86.

A large discretion is necessarily vested in the legislature to determine not only what the interests of public health, safety and morals require, but what measures are necessary for the protection of such interests.

*Young v. Lemieux,* 79 Conn., 434, 440.

The only rulings that the Board of Milk Control can make under the New York or the Connecticut statutes are such as embrace all milk dealers or licensees coming within the provisions of the Act. There is no provision in the Act whereby the Board can pick out one or spe-

cific individuals, but the Act is all inclusive and treats all similarly situated or circumstanced alike.

In the prevailing opinion in the New York Court of Appeals in this case Chief Justice Pound says:

> "The production of milk is, on account of its great importance as a human food, a chief industry in the State of New York. * * * It is of such general importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depends upon it. The entire milk product cannot be sold locally. It must be sold to milk gatherers to be shipped to the centers of population. Distributors buy the milk from the farmers. The purchaser is compelled to take what the shipper offers. The shipper offers a low rate at which milk cannot profitably be produced. The State seeks to protect the producer by fixing minimum prices for his milk to keep open the stream of milk flowing from the farm to the city and to guard the farmer from substantial loss. Price is regulated to protect the farmer from the exactions of purchasers against which he cannot protect himself."

It may likewise be said that all of these conditions are, without fear of contradiction, equally applicable to the State of Connecticut.

## II.

**The New York Milk Control Act would undoubtedly be sustained if the Court were satisfied that its purpose was solely or primarily to protect the public health and that a price fixing regulation was necessary to insure the continuance of an adequate supply of pure milk.**

There are already numerous regulations affecting every phase of the milk business, both sanitary and economic, in both the State of Connecticut and New York. We quote the following from the opinion of Chief Justice Wheeler of Connecticut in the case of *Shelton v. City of Shelton* (supra) to which we have already referred.

> "Milk is in universal use as a food; it is peculiarly liable to contamination and adulteration. Therefore, in the interest of public health and safety the regulation of its production, marketing and sale are held to be within the proper exercise of the police power of the State."

In New York a statute requiring a bond from milk stations to secure payment to producers was upheld.

> "When the legislature takes notice of the dependency of the city on the farm and of the hard and often unremunerative character of farm life, we think it may protect the farmer from fraud arising from the peculiar conditions under which milk is sold and produced."
>
> *People v. Perretta,* 253 N. Y., 305, 311.

In sustaining the constitutionality of the Sanitary Code of the City of New York regulating the sale of milk in that city, this Court said in *Lieberman v. Van De Carr,* 199 U. S. at p. 558:

> "The right of the state to regulate certain occupations which may become unsafe or dangerous when unrestrained, in the exercise of the police power, with a view to protect the public health and welfare, has been so often and so

> recently before this court that it is only necessary to refer to some of the cases which sustain the proposition that the state has a right, by reasonable regulations, to protect the public health and safety."

Commission merchants have been required to give a bond for honest accounting in the business of dealing in farm products.

*Payne v. Kansas,* 248 U. S. 112.

The New York legislature believed that the existing milk situation made a price fixing regulation necessary to the continued production and distribution of pure milk and the protection of the public health due to the threatened economic disintegration of the great dairy industry in that State. As to the effectiveness or economic wisdom of such a regulation there are undoubtedly differences of opinion and no one can now safely judge. We believe, however, that this legislation bears at least a reasonable relation to the protection of the public health and, therefore, should be sustained as a health measure. The thought or principle we have in mind is clearly stated by Mr. Justice Holmes in the prevailing opinion in the case *Block v. Hirsch,* 256 U. S. at page 158:

> "Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern of course with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world, is futile or has no reasonable

relation to the relief sought. *Chicago, Burlington & Quincy R. R. Co. v. McGuire,* 219 U. S., 549, 569."

## III.

**The statute may be upheld, inasmuch as it is to remain in force for a limited period only; *First,* as a Health Measure, on the ground of the elemental necessity of an adequate and sanitary milk supply to the public health; and *Second,* on the ground that such regulation of the milk business, as a business affected with a public use or interest, is a necessary exercise of the police power in an emergency for the public welfare.**

Milk is recognized by health authorities as a necessary item in the diet of the American people and is also authoritatively said to be relatively the cheapest source and most favorable combination of chemical and other properties necessary to preserve human life and health. It was aptly said in connection with the New York milk control legislation as to the first of these premises:

> "Under certain circumstances a monopoly may be contrary to the public interest. Under other circumstances competition may become an evil as in recent months when price cutting wars have driven down the price of *sanitary* milk far below the cost of production."

And, as to the second—

> "The conclusion is clear that the power to regulate and the extent of the regulation may not be measured by any abstract formulae and that the general guaranty of individual liberty and due process of law are subject to varying interpretation depending upon differing economic

conditions. New callings and new conditions have called for new remedies and the extension of existing ones. *In the last analysis current public opinion molding the social conscience is the silent force back of and beneath the legal language employed to sustain or reject a statute seeking to include a business as one affected with a public use.*"

> "*Legal Aspects Leading to Milk Control Law*", *by James T. Cross, New York State Bar Assoc. Bull.* May 1933, pgs. 219, 223.

It is important to observe that statutes under review in our courts involving price regulation in many instances relate to a private or ordinary business as opposed to one of vital public concern and that there is the further important difference between the *permanent* inclusion of a business as one affected with a public use or interest and a *temporary* inclusion, to tide over a grave public emergency. Also that—

> "As underlying questions of *fact* may condition the constitutionality of legislation of this character, the *presumption of constitutionality must prevail* in the absence of some factual foundation of record for overthrowing the statute."

> *O'Gorman & Young Inc. v. Hartford Fire Insur. Co.*, 282 U. S., 251.

The constitutionality of emergency legislation of this type has been sustained by this Court in the so-called Rent Cases, *Block v. Hirsch* (supra); *Marcus Brown Holding Co. v. Feldman*, 256 U. S., 170; *Levy Leasing Co. v. Seigel*, 258 U. S., 242, and *810 West End Avenue, Inc. v. Stern*, 258 U. S. 242. In the case of

*Block v. Hirsch,* the court held that if *during the emergency* the business of renting real property in the District of Columbia held such a peculiar relation to the public interest as to justify it, there would be superinduced upon that business the right of public regulation. After commenting upon the scope of the police power under which property rights may be cut down and, to that extent, taken without compensation; for example, by limiting the height of buildings in a certain quarter of a city and other like instances, Mr. Justice Holmes in the prevailing opinion goes on further to say, at page 156:

> "These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded

that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

And again at page 157—

"The main point against the law is that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the Commission established by the act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois,* 94 U. S. 113. It is said that a grain elevator may go out of business whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. *The regulation is put and justified only as a temporary measure.* See *Wilson v. New,* 243 U. S. 332, 345, 346; *Fort Smith & Western R. R. Co. v. Mills,* 253 U. S. 206. *A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.*"

## IV.

**Conditions may require the enactment of laws which might be considered arbitrary under normal conditions and although a public emergency cannot become the source of power to suspend the limitations of the Constitution, it may afford a reason for exercising a latent power of government already had but not ordinarily or previously exercised.**

The temporary regulation of wages of railroad employees was sustained in *Wilson v. New*, 243 U.S., 332, and it was held that the business of insurance is not only so far affected with a public interest that the State may regulate the *rates*, in *German Alliance Insurance Co. v. Lewis*, 233 U. S., 389, but that the *compensation* or *commission* of an insurance agent may also be limited by statute to less than the amount he would otherwise receive under his contract were it not for such limitation, in *O'Gorman & Young Inc. v. Hartford Fire Insur. Co. (supra)*.

In *Central Lumber Co. v. So. Dakota*, 226 U. S., 157, the "one price" statute of the State of South Dakota was held constitutional. The case of *Tagg Bros. & Moorhead v. U. S.*, 280 U. S., 420, decided by a unanimous court, upheld the validity of a federal regulation of live stock commission men's rates. We would also respectfully refer the Court to the following extracts from an article entitled *"Federal Anti-Trust Law and the National Industrial Recovery Act"*, by *Howard E. Wahrenbrock, published in June 1933 in Vol. 31, No. 8 of the Michigan Law Review.*

At page 1056:

> "In the recent case of *New State Ice Co. v. Liebmann*, (285 U. S. 262) the Court held invalid under the due process clause of the Fourteenth Amendment a state licensing requirement for engaging in the business of manufacturing ice, on the ground that the business was a private business and not affected with a public interest. Since *Munn v. Illinois* the problem of determining whether a regulation of busi-

ness is valid has been stated in terms of this test. Under it, state regulations of the charges of grain elevators, railroad rates, fire insurance companies' rates, rents in the war emergency, and cotton ginning have been upheld; while statutes such as the Kansas Industrial Court Act, a New York statute regulating theatre ticket brokers' fees, a New Jersey statute regulating fees of employment agencies, a Tennessee statute attempting to fix the price of gasoline, and, in the *Liebmann* case, an Oklahoma statute regulating the manufacture of ice have been declared invalid.

"Without essaying a re-examination of all aspects of the question of when a business is affected with a public interest, *it may be noted that the fact that the competitive system is not functioning properly in a particular line of business has frequently been referred to as justifying the conclusion that that business is affected with a public interest.* Justice Stone, dissenting in the New York theater ticket brokers' fee case, *Tyson v. Banton,* 273 U. S., 418 at 451-2, declared:

> *'Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community.'*

"And Justice Sutherland, speaking for the majority in the *Liebmann* case, declaring that ice companies do not have a monopoly today because of mechanical refrigeration, said:

> 'Moreover, the practical tendency of the restriction . . . is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.
>
> 'The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.
>
> 'It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources.'

"Justice Brandeis dissenting in part on the ground that the competitive system had not functioned in the ice industry in Oklahoma:

> '. . . in only six or seven localities in the State, containing, in the aggregate, not more than 235,000 of the total population of approximately 2,000,000, was there "a semblance of competition"; and that even in those localities the prices of ice were ordinarily uniform. The balance of the population was, and still is, served by companies enjoying complete

monopoly . . . Where there was competition, it often resulted to the disadvantage rather than the advantage of the public, both in respect to prices and to service.

'It is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design. The certificate of public convenience and invention (sic. necessity?) is a device—a recent social-economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest.'

"While the quotations from the two opinions in the *Liebmann* case show a conflict as to the application of the underlying principle, *both recognize that the way in which the competitive system is functioning in a line of business has significance with reference to the question whether that business is affected with a public interest.*"

And at page 1065:

"That an economic emergency may clothe business with a public interest which might not be so characterized but for those conditions, is well established.

*'The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in*

*other places would be a matter of purely private concern.' (Block v. Hirsch, supra.)*

"And in the *Liebmann* case, Justice Sutherland recognized that where the prosperity of an entire State depended upon a business, that business was affected with a public interest. Speaking of the ice business in Oklahoma, he declared:

'Here we are dealing with an ordinary business, not with a paramount industry upon which the prosperity of the entire state in large measure depends.'"

The competitive bargaining system has not worked well in the milk business and experience over a long period of years shows that competition has not efficiently regulated the business or adequately adjusted the supply of milk to the demand.

*"Constitutionality of Regulating Milk as a Public Utility"*, Manley, 18 Cornell L. Q. 410;
*"Legislative Regulation of the New York Dairy Industry"*, 42 Yale Law Journal, 1259;
*"Legal Aspects Leading to Milk Control Law"*, Cross (supra);
*Report of the "Pitcher Committee" of the New York Legislature.*

As showing the trend of recent decisions on the constitutionality of price fixing regulations, we respectfully refer the Court to the cases *Beck v. Wallace* and *Economy Dairy Co. Inc. v. Wallace,* in the Supreme Court of the District of Columbia, unofficially reported in *U. S. Law Week,* Sept. 5, 1933, 41 *Wash. Law Rep.*

633, sustaining the power of the Secretary of Agriculture under the Agricultural Adjustment Act to license milk dealers and set the prices they were to pay for milk and the prices at which they were to sell milk. The Court's decision in these cases was as follows:

> "The court finds that a national emergency exists and that the welfare of the people and the very existence of the Government itself are in peril. The day has passed when absolute vested rights in contract or property are to be regarded as sacrosanct or above the law. Neither the necessities of life nor commodities affected with a public interest can any longer be left to ruthless competition or selfish greed for their production or distribution.
>
> "The court finds that the Agricultural Adjustment Act passed by Congress May 12, 1933, is constitutional and that the regulations and licenses promulgated thereunder are reasonable and valid."

In *United States and Wallace v. Calistan Packers, Inc.* (decided Oct. 2, 1933 in the U. S. District Court for the Northern District of California), *U. S. Law Week,* Oct. 10, 1933 at p. 85, the first injunction to prevent violation of a quota for canners in the peach industry was granted under the Agricultural Adjustment Act and the Court held that the marketing agreement and license for cling peaches canned in the State of California promulgated thereunder were constitutional and valid. The court in this case found that ninety-nine and nine-tenths percent of the national production of canned peaches for interstate and foreign commerce is packed in the State of California, and held that in

view of the existing conditions of overproduction and ruinous competition,

> "the peach industry is affected with a national public interest and that the Congress has the constitutional power to adopt appropriate legislation to curb these evils."

We would also respectfully refer the Court to the recent case *Southport Petroleum Co. v. Ickes*, in the Supreme Court of the District of Columbia, *U. S. L. J.* of Aug. 22, 1933, p. 473, 41 *Wash. Law Rep.* 577, involving the constitutionality of Title I par. 9 (*c*), providing for oil regulation, of the National Industrial Recovery Act where the right of the Secretary of the Interior to prohibit the shipment in interstate commerce of oil alleged to have been illegally produced under a Texas statute was sustained.

We would also mention the recent decisions in the State Courts on the constitutionality of the widely enacted state mortgage moratorium laws, some of which have been sustained as emergency legislation and others held invalid on constitutional grounds. Inasmuch as an appeal from a decision by the Minnesota Supreme Court in one of these cases, *Blaisdell v. Home Building & Loan Assn.*, 249 N. W. 334, in which the State Court held the law a valid exercise of the police power, in view of the economic emergency, although it impaired the obligations of a mortgage contract, the court holding that such impairment was only temporary and no more than reasonably necessary and that the law was general and not objectionable as special or class legislation, was very recently fully argued before this Court at the present term, we deem it unnecessary to make further reference to these decisions.

## V.

## CONCLUSION.

In conclusion, we respectfully maintain that the production and distribution of milk is undeniably a paramount industry in the State of New York, upon which the prosperity of the entire State in large measure depends (the same may be said with equal force of Connecticut) and that the State Legislature believed that conditions in that industry made price fixing legislation temporarily necessary to the continued production and distribution of pure milk in that State, which was a vital necessity to its inhabitants and to prevent the threatened economic disintegration of the great dairy industry of that State. We, therefore, respectfully submit that this statute should be sustained, both as a necessary measure for the protection of the health of the citizens of New York and as a necessary and valid regulation of the milk business in that State in an emergency and for the public welfare, as a business affected with a vital public interest, in the firm belief that this legislation is, in its purposes, within those primary powers of government guaranteed by the State and Federal Constitution.

Respectfully submitted,

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## Appendix

# CONNECTICUT MILK CONTROL BILL

### Chapter 226 Public Acts 1933

### An Act Creating a Board of Milk Control

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. The following terms, as used in this act, unless otherwise clearly indicated by the context, shall be defined as follows: "Board" shall mean the state agency created by this act, to be known as the "board of milk control"; "person" shall mean any person, firm, corporation or association; "class" shall mean the milk used for each of the purposes for which milk is commonly used, such as fluid milk, cream or other specified class; "milk" shall mean fluid milk and cream; "milk dealer" or "dealer" shall mean any person who distributes within the state for sale therein or who sells within the state, except for consumption on the premises where produced or sold, milk as hereinbefore defined, provided producers who retail their own milk shall not be considered as dealers under the provisions of this act unless they sell more than the minimum quantity established by said board nor shall a producer who sells milk to a dealer or distributor be considered a dealer as herein defined; but any persons, firms, associations and corporations maintaining and operating separate plants and subsidiaries of such corporations shall be deemed milk dealers with respect to each plant or store so maintained and operated by them respectively; "licensee" shall mean a licensed milk dealer, but the term "licensee" shall not include a milk dealer who distributes or sells milk in an average daily quantity below that established by the Board as the minimum average daily quantity requiring a

license; "producer" shall mean a person producing milk within this state and "consumer" shall mean any person, other than a milk dealer or storekeeper, who purchases milk.

Section 2. The governor shall appoint a board of milk control consisting of three persons, two of whom shall be producers of milk and one of whom shall be designated as chairman. The term of office of each member of said board shall be from the date of his appointment until and including June 30, 1935. Any vacancy in the membership of said board shall be filled by appointment by the governor. Any member of the board may be removed by the governor for cause. Legal services and the services of experts in other lines shall be performed, as far as reasonably possible, by the state departments, including the department of agriculture, the department of the dairy and food commissioner, the state department of health and the attorney general and his assistants.

Section 3. Said board shall be allowed actual traveling and other expenses incurred in the performance of its duties and each member shall receive a per diem compensation for the time actually spent in the performance of his duties, such compensation to be determined by the board of finance and control. Said board is authorized to employ such persons as may be necessary in its opinion to assist it in its duties and may prescribe their duties and fix their compensation, subject to the approval of the board of finance and control; provided the cost of administration of said board, including expenses and compensation of members, shall not exceed the amount received as license fees collected under the provisions of this act.

Section 4. The board shall seek to achieve the purposes of this act as far as possible by promoting, encouraging and fostering co-operation among the producers, among dealers and between producers and dealers and

by promoting a more equitable distribution of the burden of the surplus and the elimination of unfair and demoralizing trade practices.

Section 5. (a) Said board shall have power to investigate and regulate the milk industry in this state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products, provided nothing in this act shall relieve officials of the state from their duties in accordance with the statutes in such cases made and provided, nor alter requirements of law as to standards of milk and its products, and as to the production thereof. (b) For the purposes of this Act, the board shall have power to subpoena milk dealers, their records, books and accounts, and any other person from whom said board may desire information to carry out the purposes and intent of this Act. Any member of the board may issue subpoenas and administer oaths to witnesses. If any person shall fail to appear in response to such subpoena, or to produce such records, books or accounts, or to answer any question addressed to him by any member of said board, the superior court of the county having jurisdiction, or, in case the person is not located in this state, the superior court of Hartford county or any judge thereof when said court shall not be in session, upon application made to it or to him and upon proof being made of such failure, may make an order requiring such witness to appear and testify before said board and answer any question material to such investigation and to produce such records, books or accounts, and, if any person shall fail to comply with any requirement of any such order, said court or such judge shall commit such person to jail until he shall comply therewith, but not for a longer period than sixty days. (c) The board shall have power to require reports of the quantities and sources of milk and cream or any products thereof received by dealers, of the quantities sold by them in the various classes and grades of milk and cream and their products, together with

the prices paid and received for them in their several classes, and such other records and information as the board may deem necessary for the enforcement of this act. (d) The board shall have power to act as investigator and to find, report and publish facts on complaints made to it by producers, dealers or consumers in regard to contracts, agreements and practices which are alleged to be unethical and unfair to the industry; the findings of the board on such complaints, by agreement of parties made in advance of hearing, to become final and binding. Irrespective of complaints addressed to said board by such persons, it may, on its own motion, make such investigations as above outlined and report to the governor, and such reports shall be public documents.

Section 6. Said board shall also have the power to fix and establish, from time to time, a minimum price for the different markets of the state for each class of milk; (a) to be paid to the producers; (b) to be paid, at wholesale or retail, by consumers, such minimum, wholesale and retail prices to cover sales by dealers and licensees, other than stores, to consumers; (c) to be paid to dealers and licensees by stores and other wholesale purchasers, except sales to other dealers or licensees who are shippers or distributors; (d) to be paid to stores by consumers.

Section 7. No person shall distribute or sell milk within the state, unless he shall be licensed as provided herein, nor shall any dealer so licensed sell or offer for sale any milk or cream to any other dealer in the state who is unlicensed, if under the provisions of this act he should be licensed. Applications for licenses to distribute or sell milk shall be made to the board in writing within twenty days after the passage of this act, by milk dealers in business at the time of the passage of this act upon blanks prepared under the authority of the board. Any person who, after July 1, 1933,

shall desire to engage in business as a milk dealer, shall file an application to be licensed not less than fifteen days before he shall engage in such business. The applicant shall state on such blanks such particular information in regard to his business or proposed business relative to the distribution or sale of milk as may reasonably be required by the board. Each application shall be accompanied by a license fee in accordance with the schedule stated in section eight hereof. The board may decline to grant a license or may revoke a license if satisfied after hearing of the existence of any of the following: (1) That the applicant has not complied, and is not prepared to comply, with the provisions of chapter 135 of the general statutes, and the rules and regulations set up under the provisions of said chapter by the milk regulation board; (2) that he has refused, without reasonable cause, milk agreed to be purchased from a producer; (3) that he has failed, without reasonable cause, to account and make payment for milk so purchased; (4) that he has made a general assignment for the benefit of creditors or been adjudged a bankrupt unless he shall file a bond in an amount satisfactory to said board or shall present to said board adequate proof of his ability to pay for milk so purchased; (5) that he is engaged in unfair practices such as giving milk with other purchases or allowing rebates other than ordinary trade discounts; (6) that he has failed either to keep records or furnish statements or information required of him by the board under the provisions of this act; (7) that he has failed to comply with minimum prices fixed by the board under the authority of this act.

Section 8. A milk dealer, in his application, shall state the amount of milk which he usually distributes or sells or proposes to distribute or sell as a daily average. For the purposes of this section, one-half pint of cream shall be considered the equivalent of one quart of milk. For such daily average not in excess of one

hundred quarts the license fee shall be five dollars. License fees shall increase at the rate of five dollars for each daily average of one hundred quarts or fraction thereof so to be distributed or sold. Each plant or store of an applicant shall require a separate license, if there shall be distributed or sold therefrom a daily average in excess of the minimum amount fixed and established by the board. If distributions and sales by a licensee shall prove to be in excess of the daily average of amounts estimated by the licensee, additional license fees, proportional to such excess so sold or distributed, shall be paid by the licensee. The first license period shall be from the date of the issuance of the license to and including June 30, 1934. The following license period shall be from July 1, 1934, to and including June 30, 1935.

Section 9. Any person aggrieved by any action of the board may appeal therefrom to the superior court for Hartford county within ten days after written notice to him of such action. Such appeals shall be taken in the manner prescribed in section 3608 of the general statutes for appeals from the decisions of the public utilities commission. Within ten days after the filing of any such appeal, any person affected by such action of the board may make application to the court to be joined as a party plaintiff.

Section 10. Each application for a license shall be acted upon by the board within twenty days from its receipt. License fees accompanying applications shall be paid by the board to the state treasurer. All applicants whose licenses have been refused shall be entitled to a return of the fees accompanying their application.

Section 11. No provision of this act shall revoke or abridge any existing contract of any cooperative corporation, organized or operated under or subject to the provisions of chapter 194 of the general statutes

or any similar statute of another state and engaged in making collective sales or marketing of milk for the producers thereof from blending the net proceeds of all its sales in various classes, whether in fluid form or as manufactured products, and paying its producers such blended price. No provision of this act shall affect any contract between a nonresident milk dealer and a resident milk producer or between a resident milk dealer and a nonresident producer. No provision of this act shall prevent any dealer from giving milk in charity or from furnishing milk to any charitable association or municipal corporation to be distributed to needy persons for charitable relief, nor from furnishing milk for such charitable purposes at a price below that fixed by the board.

Section 12. The comptroller shall furnish an office for said board in the state capitol or the state office building, together with suitable equipment and supplies therefor.

Section 13. Said board may make and, from time to time, revise such rules and regulations as may be necessary for the administration of this act. Each regulation adopted by said board shall state the date on which it shall take effect, and a copy thereof, signed by the chairman of the board, shall be filed in the office of the secretary of the state. Each such regulation shall be published in such manner as said board may determine.

Section 14. If any provision of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not invalidate the remainder thereof.

Section 15. Any person or the officer of any corporation which shall violate any provision of this act

shall be fined not more than five hundred dollars or imprisoned not more than one year or both.

Section 16. This act shall take effect from its passage, except sections five to ten, inclusive, which shall take effect thirty days after its passage.

*Note:* Above Bill passed Legislature May 17, 1933.

CORRECTED COPY pp. 3, 13, 18

# SUPREME COURT OF THE UNITED STATES.

No. 531.—October Term, 1933.

Leo Nebbia, Appellant,
*vs.*
The People of the State of New York. } Appeal from the County Court of Monroe County, New York.

[March 5, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

The Legislature of New York established by Chapter 158 of the Laws of 1933, a Milk Control Board with power, among other things to "fix minimum and maximum . . . retail prices to be charged by . . . . stores to consumers for consumption off the premises where sold." The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester sold two quarts and a five cent loaf of bread for eighteen cents; and was convicted for violating the Board's order. At his trial he asserted the statute and order contravene the equal protection clause and the due process clause of the Fourteenth Amendment, and renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction.[1]

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk. We first inquire as to the occasion for the legislation and its history.

During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve.

On March 10, 1932, the senate and assembly resolved "That a joint Legislative committee is hereby created . . . to investigate the causes of the decline of the price of milk to pro-

[1] *People* v. *Nebbia*, 262 N. Y. 259.

ducers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer." The committee organized May 6, 1932, and its activities lasted nearly a year. It held 13 public hearings at which 254 witnesses testified and 2350 typewritten pages of testimony were taken. Numerous exhibits were submitted. Under its direction an extensive research program was prosecuted by experts and official bodies and employees of the state and municipalities, which resulted in the assembling of much pertinent information. Detailed reports were received from over 100 distributors of milk, and these were collated and the information obtained analyzed. As a result of the study of this material a report covering 473 closely printed pages, embracing the conclusions and recommendations of the committee, was presented to the legislature April 10, 1933. This document included detailed findings with copious references to the supporting evidence; appendices outlining the nature and results of prior investigations of the milk industry of the state, briefs upon the legal questions involved, and forms of bills recommended for passage. The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions.

In part those conclusions are:

Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.

The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

In addition to the general price decline, other causes for the low price of milk include a periodic increase in the number of cows and in milk production, the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets, and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.

The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent., because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i. e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment.

Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry. The provisions of the statute are summarized in the margin.[2]

[2]Chapter 158 of the Laws of 1933 added a new Article (numbered 25) to the Agriculture and Markets Law. The reasons for the enactment are set forth in the first section (§ 300). So far as material they are: that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices exist in the production, sale and distribution of milk and milk products, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled; these conditions are a menace to the public health, welfare and reasonable comfort; the production and distribution of milk is a paramount industry upon which the prosperity of the state in a great measure depends; existing economic conditions have largely destroyed the purchasing power of milk producers for industrial products, have broken down the orderly production and marketing of milk, and have seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. The danger to public health and welfare consequent upon these conditions is declared to be immediate and to require public supervision and control of the industry to enforce proper standards of production, sanitation and marketing.

The law then (§ 301) defines the terms used; declaring, *inter alia*, that "milk dealer" means any person who purchases or handles milk within the state, for sale in the state, or sells milk within the state except when consumed on the premises where sold; and includes within the definition of "store" a grocery store.

By § 302 a state Milk Control Board is established; and by § 303 general power is conferred upon that body to supervise and regulate the entire milk industry of the state, subject to existing provisions of the public health law, the public service law, the state sanitary code, and local health ordinances and regulations; to act as arbitrator or mediator in controversies arising between producers and dealers, or groups within those classes, and to exercise certain special powers to which reference will be made.

The Board is authorized to promulgate orders and rules which are to have the force of law (§ 304); to make investigations (§ 305); to enter and inspect premises in which any branch of the industry is conducted, and examine the books, papers and records of any person concerned in the industry (§ 306); to license all milk dealers and suspend or revoke licenses for specified causes, its action in these respects being subject to review by certiorari (§ 308), and to require licensees to keep records (§ 309) and to make reports (§ 310).

A violation of any provision of Article 25 or of any lawful order of the Board is made a misdemeanor (§ 307).

By § 312 it is enacted (a): "The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the

Section 312 (e) on which the prosecution in the present case is founded, provides: "After the board shall have fixed prices to be charged or paid for milk in any form . . . it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price . . . , and no method or device shall be lawful whereby milk is bought or sold . . . at a price less or more than such price . . . whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise . . . ".

*First.* The appellant urges that the order of the Milk Control Board denies him the equal protection of the laws. It is shown that the order requires him, if he purchases his supply from a dealer, to pay eight cents per quart and five cents per pint, and to resell at not less than nine and six, whereas the same dealer may buy his supply from a farmer at lower prices and deliver milk to consumers at ten cents the quart and six cents the pint. We think the con-

several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk . . . and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer". (b) After such investigation the board shall by official order fix minimum and maximum wholesale and retail prices to be charged by milk dealers to consumers, by milk dealers to stores for consumption on the premises or for resale to consumers, and by stores to consumers for consumption off the premises where sold. It is declared (c) that the intent of the law is that the benefit of any advance in price granted to dealers shall be passed on to the producer, and if the board, after due hearing, finds this has not been done, the dealer's license may be revoked, and the dealer may be subjected to the penalties mentiond in the Act. The board may (d) after investigation fix the prices to be paid by dealers to producers for the various grades and classes of milk.

Subsection (e), on which the prosecution in the present case is founded, is quoted in the text.

Alterations may be made in existing orders after hearing of the interested parties (f) and orders made are subject to review on certiorari. The board (§ 319) is to continue with all the powers and duties specified until March 31, 1934, at which date it is to be deemed abolished. The Act contains further provisions not material to the present controversy.

tention that the discrimination deprives the appellant of equal protection is not well founded. For aught that appears, the appellant purchased his supply of milk from a farmer as do distributors, or could have procured it from a farmer if he so desired. There is therefore no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection. But if it were shown that the appellant is compelled to buy from a distributor, the difference in the retail price he is required to charge his customers, from that prescribed for sales by distributors is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the legislature possesses the power to control the prices to be charged for fluid milk. Compare *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527.

*Second.* The more serious question is whether, in the light of the conditions disclosed, the enforcement of Section 312 (e) denied the appellant the due process secured to him by the Fourteenth Amendment.

Save the conduct of railroads, no business, has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862[3] and subsequent statutes,[4] have been carried into the general codification known as the Agriculture and Markets Law.[5] A perusal of these statutes discloses that the milk industry has been progressivly subjected to a larger measure of control.[6] The producer or dairy farmer is in certain circum-

[3]Laws of 1862, Chap. 467.

[4]Laws of 1893, Chap. 338. Laws of 1909, Chap. 9; Consol. Laws Chap. 1.

[5]Laws of 1927, Chap. 207; Cahill's Consolidated Laws of New York, 1930, Chap. 1.

[6]Many of these regulations have been unsuccessfully challenged on constitutional grounds. See *People* v. *Cipperly*, 101 N. Y. 634; *People* v. *Hill*, 44 Hun, 472; *People* v. *West*, 106 N. Y. 293; *People* v. *Kibler*, 106 N. Y. 321; *People* v. *Hills*, 64 App. Div. 584; *People* v. *Bowen*, 182 N. Y. 1; *Lieberman* v. *Van de Carr*, 199 U. S. 552; *St. John* v. *New York*, 201 U. S. 633; *People* v. *Koster*, 121 App. Div. 852; *People* v. *Abramson*, 208 N. Y. 138; *People* v. *Frudenberg*, 209 N. Y. 218; *People* v. *Beakes Dairy Co.*, 222 N. Y. 416; *People* v. *Teuscher*, 248 N. Y. 454; *People* v. *Perretta*, 253 N. Y. 305; *People* v. *Ryan*, 230 App. Div. 252; *Mintz* v. *Baldwin*, 289 U. S. 346.

stances liable to have his herd quarantined against bovine tuberculosis; is limited in the importation of dairy cattle to those free from Bang's disease; is subject to rules governing the care and feeding of his cows and the care of the milk produced, the condition and surroundings of his barns and buildings used for production of milk, the utensils used, and the persons employed in milking (§§ 46, 47, 55, 72-88). Proprietors of milk gathering stations or processing plants are subject to regulation (§ 54), and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices (§§ 57, 57a, 252). In addition there is a large volume of legislation intended to promote cleanliness and fair trade practices, affecting all who are engaged in the industry.[7] The challenged amendment of 1933 carried regulation much farther than the prior enactments. Appellant insists that it went beyond the limits fixed by the Constitution.

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights[8] nor contract rights[9] are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form "a portion of that immense mass of legislation, which embraces every thing within the territory of a State, . . . all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, . . . are component parts of this mass."[10]

[7]See Cahill's Consolidated Laws of New York, 1930, and Supplements to and including 1933: Chap. 21, Secs. 270-274; Chap. 41, Secs. 435, 538, 1740, 1764, 2350-2357; Chap. 46, Secs. 6-a, 20, 21.

[8]*Munn* v. *Illinois*, 94 U. S. 113, 124, 125; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 566; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 351; and see the cases cited in notes 16-23, *infra*.

[9]*Allgeyer* v. *Louisiana*, 165 U. S. 578, 591; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 202; *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 567; *Stephenson* v. *Binford*, 287 U. S. 251, 274.

[10]*Gibbons* v. *Ogden*, 9 Wheat. 1, 203.

Justice Barbour said for this court:

". . . it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."[11]

And Chief Justice Taney said upon the same subject:

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States."[12]

Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power,[13] as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent

[11] *City of New York* v. *Miln*, 11 Pet. 102, 139.

[12] *License Cases*, 5 How. 504, 583.

[13] *United States* v. *Dewitt*, 9 Wall. 41; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215.

abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

The Fifth Amendment, in the field of federal activity,[14] and the Fourteenth, as respects State action,[15] do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community.[16] The state may control the use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location,[17] or their use for certain kinds of advertising;[18] may in certain circumstances authorize encroachments by party walls in cities;[19] may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries and structures likely injuriously to affect the public

[14] *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 228-229.

[15] *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Chicago B. & Q. R. Co.* v. *Drainage Comm'rs*, 200 U. S. 561, 592.

[16] *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527.

[17] *Cusack Co.* v. *City of Chicago*, 242 U. S. 526; *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269.

[18] *Packer Corp.* v. *Utah*, 285 U. S 105.

[19] *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22.

health or safety;[20] or may establish zones within which certain types of buildings or businesses are permitted and others excluded.[21] And although the Fourteenth Amendment extends protection to aliens as well as citizens,[22] a state may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land.[23]

Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process.[24] These measures not only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract while less directly affecting property rights.[25]

[20] *Fischer* v. *St. Louis*, 194 U. S. 361; *Welch* v. *Swasey*, 214 U. S. 91; *Hadacheck* v. *Sebastian*, 239 U. S. 394; *Reinman* v. *Little Rock*, 237 U. S. 171.

[21] *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Zahn* v. *Board of Public Works*, 274 U. S. 325; *Gorieb* v. *Fox*, 274 U. S. 603.

[22] *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369.

[23] *Terrace* v. *Thompson*, 263 U. S. 197; *Webb* v. *O'Brien*, 263 U. S. 313.

[24] Forbidding transmission of lottery tickets, *Lottery Case*, 188 U. S. 321; transportation of prize fight films, *Weber* v. *Freed*, 239 U. S. 325; the shipment of adulterated food, *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; transportation of women for immoral purposes, *Hoke* v. *United States*, 227 U. S. 308; *Caminetti* v. *United States*, 242 U. S. 470; transportation of intoxicating liquor, *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; requiring the public weighing of grain, *Merchants Exchange* v. *Missouri*, 248 U. S. 365; regulating the size and weight of loaves of bread, *Schmidinger* v. *Chicago*, 226 U. S. 578; *Petersen Baking Co.* v. *Bryan*, No. 203, Oct. T. 1933, decided Jan. 8, 1934; regulating the size and character of packages in which goods are sold, *Armour & Co.* v. *North Dakota*, 240 U. S. 510; regulating sales in bulk of a stock in trade, *Lemieux* v. *Young*, 211 U. S. 489; *Kidd, Dater Co.* v. *Musselman Grocer Co.*, 217 U. S. 461; sales of stocks and bonds, *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539; *Merrick* v. *Halsey & Co.*, 242 U. S. 568; requiring fluid milk offered for sale to be tuberculin tested, *Adams* v. *Milwaukee*, 228 U. S. 572; regulating sales of grain by actual weight, and abrogating exchange rules to the contrary, *House* v. *Mayes*, 219 U. S. 270; subjecting state banks to assessments for a state depositors' guarantee fund, *Noble State Bank* v. *Haskell*, 219 U. S. 104.

[25] Prescribing hours of labor in particular occupations, *Holden* v. *Hardy*, 169 U. S. 366; *B. & O. R. R. Co.* v. *I. C. C.*, 221 U. S. 612; *Bunting* v. *Oregon*, 243 U. S. 426; prohibiting child labor, *Sturges & Burn* v. *Beauchamp*, 231 U. S. 320; forbidding night work by women, *Radice* v. *New York*, 264

The constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited;[26] and the right to conduct a business, or to pursue a calling, may be conditioned.[27] Regulation of a business to prevent waste of the state's resources may be justified.[28] And statutes prescribing the terms upon which those

U. S. 292; reducing hours of labor for women, *Muller* v. *Oregon*, 208 U. S. 412; *Riley* v. *Massachusetts*, 232 U. S. 671; *Miller* v. *Wilson*, 236 U. S. 373; fixing the time for payment of seamen's wages, *Patterson* v. *Bark Eudora*, 190 U. S. 169; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348; of wages of railroad employes, *St. Louis, I. M. & St. P. Ry. Co.* v. *Paul*, 173 U. S. 404; *Erie R. R. Co.* v. *Williams*, 233 U. S. 685; regulating the redemption of store orders issued for wages, *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224; regulating the assignment of wages, *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; requiring payment for coal mined on a fixed basis other than that usually practiced, *McLean* v. *Arkansas*, 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple*, 236 U. S. 338; establishing a system of compulsory workmen's compensation, *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219.

[26]Sales of stock or grain on margin, *Booth* v. *Illinois*, 184 U. S. 425; *Brodnax* v. *Missouri*, 219 U. S. 285; *Otis* v. *Parker*, 187 U. S. 606; the conduct of pool and billiard rooms by aliens, *Clarke* v. *Deckebach*, 274 U. S. 392; the conduct of billiard and pool rooms by anyone, *Murphy* v. *California*, 225 U. S. 623; the sale of liquor, *Mugler* v. *Kansas*, 123 U. S. 623; the business of soliciting claims by one not an attorney, *McCloskey* v. *Tobin*, 252 U. S. 107; manufacture or sale of oleomargarine, *Powell* v. *Pennsylvania*, 127 U. S. 678; hawking and peddling of drugs or medicines, *Baccus* v. *Louisiana*, 232 U. S. 334; forbidding any other than a corporation to engage in the business of receiving deposits, *Dillingham* v. *McLaughlin*, 264 U. S. 370, or any other than corporations to do a banking business, *Shallenberger* v. *First State Bank*, 219 U. S. 114.

[27]Physicians, *Dent* v. *West Virginia*, 129 U. S. 114; *Watson* v. *Maryland*, 218 U. S. 173; *Crane* v. *Johnson*, 242 U. S. 339; *Hayman* v. *Galveston*, 273 U. S. 414; dentists, *Douglas* v. *Noble*, 261 U. S. 165; *Graves* v. *Minnesota*, 272 U. S. 425; employment agencies, *Brazee* v. *Michigan*, 241 U. S. 340; public weighers of grain, *Merchants Exchange* v. *Missouri*, 248 U. S. 365; real estate brokers, *Bratton* v. *Chandler*, 260 U. S. 110; insurance agents, *La Tourette* v. *McMaster*, 248 U. S. 465; insurance companies, *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; the sale of cigarettes, *Gundling* v. *Chicago*, 177 U. S. 183; the sale of spectacles, *Roschen* v. *Ward*, 279 U. S. 337; private detectives, *Lehon* v. *City of Atlanta*, 242 U. S. 53; grain brokers, *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; business of renting automobiles to be used by the renter upon the public streets, *Hodge Drive-it-yourself Co.* v. *Cincinnati*, 284 U. S. 335.

[28]*Champlin Refining Co.* v. *Corporation Comm.*, 286 U. S. 210. Compare *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 21-22.

conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.[29]

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another,[30] by giving trade inducements to purchasers,[31] and by other forms of price discrimination.[32] The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies,[33] which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees.[34] Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them.[35]

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[29]Contracts of carriage, *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; agreements substituting relief or insurance payments for actions for negligence, *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549; affecting contracts of insurance, *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489; *National Ins. Co.* v. *Wanberg*, 260 U. S. 71; *Hardware Dealers Mut. F. I. Co.* v. *Glidden Co.*, 284 U. S. 151; contracts for sale of real estate, *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112; contracts for sale of farm machinery, *Advance-Rumely Co.* v. *Jackson*, 287 U. S. 283; bonds for performance of building contracts, *Hartford Accident & Indemnity Co.* v. *Nelson Mfg. Co.*, No. 239, Oct. T. 1933, decided February 5, 1934.

[30]*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.

[31]*Rast* v. *Van Deman & Lewis*, 240 U. S. 342.

[32]*Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245.

[33]State statutes: *Smiley* v. *Kansas*, 196 U. S. 447; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433; *International Harvester Co.* v. *Missouri*, 234 U. S. 199.

Federal statutes: *United States* v. *Joint Traffic Association*, 171 U. S. 505, 559, 571-573; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 228-9; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 332; *United Shoe Mach. Corp.* v. *United States*, 258 U. S. 451, 462-464.

[34]*Slaughter-House Cases*, 16 Wall. 36; *Conway* v. *Taylor's Executor*, 1 Black 603; *Crowley v. Christensen*, 137 U. S. 86.

[35]*Madera Water Works Co.* v. *Madera*, 228 U. S. 454; *Jones* v. *City of Portland*, 245 U. S. 217; *Green* v. *Frazier*, 253 U. S. 233; *Standard Oil Co.* v. *City of Lincoln*, 275 U. S. 504.

The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk.

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is *per se* unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might

appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois*, 94 U. S. 113. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. Munn and Scott held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves. Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a "virtual monopoly". This

meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. It is true that the court cited a statement from Lord Hale's *De Portibus Maris,* to the effect that when private property is "affected with a public interest, it ceases to be *juris privati* only"; but the court proceeded at once to define what it understood by the expression, saying: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large" (p. 126). Thus understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power;" and it is plain that nothing more was intended by the expression. The court had been at pains to define that power (pp. 124, 125) ending its discussion in these words:

"From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation."[36]

In the further discussion of the principle it is said that when one devotes his property to a use, "in which the public has an interest," he in effect "grants to the public an interest in that use" and must submit to be controlled for the common good. The conclusion is that if Munn and Scott wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and

[36]As instances of Acts of Congress regulating private businesses consistently with the due process guarantee of the Fifth Amendment the court cites those fixing rates to be charged at private wharves, by chimney-sweeps and hackneys, cartmen, wagoners and draymen in the District of Columbia (p. 125).

Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue.

In the same volume the court sustained regulation of railroad rates.[37] After referring to the fact that railroads are carriers for hire, are incorporated as such, and given extraordinary powers in order that they may better serve the public, it was said that they are engaged in employment "affecting the public interest", and therefore, under the doctrine of the *Munn* case, subject to legislative control as to rates. And in another of the group of railroad cases then heard[38] it was said that the property of railroads is "clothed with a public interest" which permits legislative limitation of the charges for its use. Plainly the activities of railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affectation or clothing with a public interest is needed to justify the regulation. And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers.

The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state, *Munn* v. *Illinois, supra.* Nor is it the enjoyment of a monopoly; for in *Brass* v. *North Dakota*, 153 U. S. 391, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about six hundred grain elevators existed along the line of the Great Northern Railroad, in North Dakota; that at the very station where the defendant's elevator was located two others operated; and that the business was keenly competitive throughout the state.

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[37] *Chicago, B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155. It will be noted that the emphasis is here reversed, and the carrier is said to be in a business affecting the public not that the business is somehow affected by an interest of the public.

[38] *Peik* v. *C. & N. W. Ry. Co.*, 94 U. S. 164.

In *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, a statute fixing the amount of premiums for fire insurance was held not to deny due process. Though the business of the insurers depended on no franchise or grant from the state, and there was no threat of monopoly, two factors rendered the regulation reasonable. These were the almost universal need of insurance protection and the fact that while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates. The court was at pains to point out that it was impossible to lay down any sweeping and general classification of businesses as to which price-regulation could be adjudged arbitrary or the reverse.

Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The usury laws fix the price which may be exacted for the use of money, although no business more essentially private in character can be imagined than that of loaning one's personal funds. *Griffith* v. *Connecticut*, 218 U. S. 563. Insurance agents' compensation may be regulated, though their contracts are private, because the business of insurance is considered one properly subject to public control. *O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U. S. 251. Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal and private nature, are not a deprivation of due process. *Frisbie* v. *United States*, 157 U. S. 160; *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208; *Calhoun* v. *Massie*, 253 U. S. 170; *Newman* v. *Moyers*, 253 U. S. 182; *Yeiser* v. *Dysart*, 267 U. S. 540; *Margolin* v. *United States*, 269 U. S. 93. A stockyards corporation, "while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest," and its charges may be controlled. *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, 85. Private contract carriers, who do not operate under a franchise, and have no monopoly of the carriage of goods or passengers, may, since they use the highways to compete with railroads, be compelled to charge rates not lower than those of public carriers for corresponding services, if the state, in pursuance of a public policy to protect the latter, so determines. *Stephenson* v. *Binford*, 287 U. S. 251, 274.

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 535. The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest", and "clothed with a public use", have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect.[39] But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature ~~arm~~, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337-8.

[39] See *Wolff Packing Co.* v. *Court of Industrial Relations, supra; Tyson & Brother* v. *Banton*, 273 U. S. 418; *Ribnik* v. *McBride*, 277 U. S. 350; *Williams* v. *Standard Oil Co.*, 278 U. S. 235.

And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.[40]

The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process.[41] Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained.[42] If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests,[43] produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming

[40]See *McLean* v. *Arkansas*, 211 U. S. 539, 547; *Tanner* v. *Little*, 240 U. S. 369, 385; *Green* v. *Frazier*, 253 U. S. 233, 240; *O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U. S. 251, 257-8; *Gant* v. *Oklahoma City*, 289 U. S. 98, 102.

[41]See note 32, *supra*.

[42]*Public Service Comm.* v. *Great Northern Utilities Co.*, 289 U. S. 130; *Stephenson* v. *Binford*, *supra*. See the Transportation Act, 1920, 41 Stat. 456, §§ 418, 422, amending § 15 of the Interstate Commerce Act, and compare *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462; *New England Divisions Case*, 261 U. S. 184, 190, 196.

[43]See *Public Service Comm.* v. *Great Northern Utilities Co.*, *supra*.

public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

The judgment is

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

No. 531.—October Term, 1933.

Leo Nebbia, Appellant, vs. The People of the State of New York. } Appeal from the County Court of Monroe County, State of New York.

[March 5, 1934.]

Separate Opinion of Mr. Justice McReynolds.

By an act effective April 10, 1933 (Laws, 1933, Ch. 158), when production of milk greatly exceeded the demand, the Legislature created a Control Board with power to "regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale. . . ." The "board may adopt and enforce all rules and all orders necessary to carry out the provisions of this article . . . A rule of the board when duly posted and filed as provided in this section shall have the force and effect of law. . . . A violation of any provision of this article or of any rule or order of the board lawfully made, except as otherwise expressly provided by this article, shall be a misdemeanor. . . ." After considering "all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer . . ." the board "shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state."

April 17, this Board prescribed nine cents per quart as the minimum at which "a store" might sell.* April 19, appellant

*Official Order No. 5, effective April 17, 1933. Ordered that until further notice and subject to the exceptions hereinafter made, the following shall be the minimum prices to be charged for all milk and cream in any and all cities and villages of the State of New York, of more than One Thousand (1,000) population, exclusive of New York City and the Counties of Westchester, Nassau and Suffolk:

Milk—Quarts in bottles: By milk dealers to consumers 10 cents; by milk dealers to stores 8 cents; by stores to consumers 9 cents.

Pints in bottles: By milk dealers to consumers 6 cents; by milk dealers to stores 5 cents; by stores to consumers 6 cents. . . .

. . . . . .

The Control Act declares:

"Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when

Nebbia, a small store-keeper in Rochester, sold two bottles at a less price. An information charged that by so doing he committed a misdemeanor. A motion to dismiss which challenged the validity of both statute and order being overruled, the trial proceeded under a plea of not guilty. The Board's order and statements by two witnesses tending to show the alleged sale constituted the entire evidence. Notwithstanding the claim, that under the XIV Amendment the State lacked power to prescribe prices at which he might sell pure milk, lawfully held, he was adjudged guilty and ordered to pay a fine.

The Court of Appeals affirmed the conviction. Among other things, it said:—

> The sale by Nebbia was a violation of the statute "inasmuch as the Milk Control Board had fixed a minimum price for milk at nine cents per quart."
>
> "The appellant not unfairly summarizes this law by saying that it first declares that milk has been selling too cheaply in the State of New York, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote of three officials. As an aid in enforcing the rate regulation, the milk industry in the State of New York is made a business affecting the public health and interest until March 31, 1934, and the Board can exclude from the milk business any violator of the statute or the Board's orders."
>
> In fixing [sale] prices the Board "must take into consideration the amount necessary to yield a 'Reasonable return' to the producer and the milk dealer. . . . The fixing of minimum prices is one of the main features of the act. The ques-

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consumed on the premises where sold. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

"Producer" means a person producing milk within the state of New York.

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

tion is whether the act, so far as it provides for fixing minimum prices for milk, is unconstitutional . . . in that it interferes with the right of the milk dealer to carry on his business in such manner as suits his convenience without State interference as to the price at which he shall sell his milk. The power thus to regulate private business can be invoked only under special circumstances. It may be so invoked when the Legislature is dealing with a paramount industry upon which the prosperity of the entire State in large measure depends. It may not be invoked when we are dealing with an ordinary business, essentially private in its nature. This is the vital distinction pointed out in New State Ice Co. *v.* Liebmann (285 U. S. 262, 277). . . .

"The question is as to whether the business justifies the particular restriction, or whether the nature of the business is such that any competent person may, conformably to reasonable regulation, engage therein. The production of milk is, on account of its great importance as human food, a chief industry of the State of New York. . . . It is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depend upon it. . . . The State seeks to protect the producer by fixing a minimum price for his milk to keep open the stream of milk flowing from the farm to the city and to guard the farmer from substantial loss. . . . Price is regulated to protect the farmer from the exactions of purchasers against which he cannot protect himself. . . .

"Concededly the Legislature cannot decide the question of emergency and regulation, free from judicial review, but this court should consider only the legitimacy of the conclusions drawn from the facts found.

"We are accustomed to rate regulation in cases of public utilities and other analogous cases and to the extension of such regulative power into similar fields. . . . This case, for example, may be distinguished from the Oklahoma ice case (New State Ice Co. *v.* Liebmann, 285 U. S. 262, 277) holding that the business of manufacturing and selling ice cannot be made a public business to which it bears a general resemblance. The New York law creates no monopoly; does not restrict production; was adopted to meet an emergency; milk is a greater

family necessity than ice. . . . Mechanical concepts of jurisprudence make easy a decision on the strength of seeming authority. . . .

"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract . . . ; with the natural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the great public needs; . . . that statutes aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view; . . .

"With full respect for the Constitution as an efficient frame of government in peace and war, under normal conditions or in emergencies; with cheerful submission to the rule of the Supreme Court that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation only, and that legislative conclusions based on findings of fact are subject to judicial review, we do not feel compelled to hold that the 'due process' clause of the Constitution has left milk producers unprotected from oppression and to place the stamp of invalidity on the measure before us.

"With the wisdom of the legislation we have naught to do. It may be vain to hope by laws to oppose the general course of trade. . . .

"We are unable to say that the Legislature is lacking in power, not only to regulate and encourage the production of milk, but also, when conditions require, to regulate the prices to be paid for it, so that a fair return may be obtained by the producer and a vital industry preserved from destruction. . . . The policy of non-interference with individual freedom must at times give way to the policy of compulsion for the general welfare."

Our question is whether the Control Act, as applied to appellant through the order of the Board, number five, deprives him of rights guaranteed by the XIV Amendment. He was convicted of a crime for selling his own property—wholesome milk—in the ordinary course of business at a price satisfactory to himself and the cus-

tomer. We are not immediately concerned with any other provision of the act or later orders. Prices at which the producer may sell were not prescribed—he may accept any price—nor was production in any way limited. "To stimulate the production of a vital food product" was not the purpose of the statute. There was an oversupply of an excellent article. The affirmation is "that milk has been selling too cheaply . . . and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime."

The opinion below points out that the statute expires March 31, 1934, "and is avowedly a mere temporary measure to meet an existing emergency"; but the basis of the decision is not explicit. There was no definite finding of an emergency by the court upon consideration of established facts and no pronouncement that conditions were accurately reported by a legislative committee. Was the legislation upheld because only temporary and for an emergency; or was it sustained upon the view that the milk business bears a peculiar relation to the public, is affected with a public interest, and, therefore, sales prices may be prescribed irrespective of exceptional circumstances? We are left in uncertainty. The two notions are distinct if not conflicting. Widely different results may follow adherence to one or the other.

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The theory that legislative action which ordinarily would be ineffective because of conflict with the Constitution may become potent if intended to meet peculiar conditions and properly limited, was lucidly discussed and its weakness disclosed by the dissenting opinion in *Home Building & Loan Assn.* v. *Blaisdell* (January 8, 1934). Sixty years ago, in *Milligan's* case, this Court declared it inimicable to Constitutional government and did "write the vision and make it plain upon tables that he may run that readeth it."

Milligan, charged with offenses against the United States committed during 1863 and 1864 was tried, convicted and sentenced to be hanged by a military commission proceeding under an Act of Congress passed in 1862. The crisis then existing was urged in justification of its action. But this Court held the right of trial by jury did not yield to emergency; and directed his release. "Those great and good men [who drafted the Constitution] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to

accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.". *Ex parte Milligan* (1866), 4 Wall. 2, 120.

The XIV Amendment wholly disempowered the several States to "deprive any person of life, liberty, or property, without due process of law." The assurance of each of these things is the same. If now liberty or property may be struck down because of difficult circumstances, we must expect that hereafter every right must yield to the voice of an impatient majority when stirred by distressful exigency. Amid the turmoil of civil war Milligan was sentenced: happily, this Court intervened. Constitutional guaranties are not to be "thrust to and fro and carried about with every wind of doctrine." They were intended to be immutable so long as within our charter. Rights shielded yesterday should remain indefeasible today and tomorrow. Certain fundamentals have been set beyond experimentation; the Constitution has released them from control by the State. Again and again this Court has so declared.

*Adams* v. *Tanner*, 244 U. S. 590, condemned a Washington initiative measure which undertook to destroy the business of private employment agencies because it unduly restricted individual liberty. We there said—"The fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

*Buchanan* v. *Warley*, 245 U. S. 60, held ineffective an ordinance which forbade negroes to reside in a city block where most of the houses were occupied by whites. "It is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases." *Southern Ry. Co.* v. *Virginia* (December 4, 1933)—"The claim that the questioned statute was enacted under the police power of the State

and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every State power is limited by the inhibitions of the XIV Amendment."

*Adkins* v. *Children's Hospital*, 261 U. S. 525, 545.—"That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause [Fifth Amendment], is settled by the decisions of this Court and is no longer open to question."

*Meyer* v. *Nebraska*, 262 U. S. 390, 399, held invalid a State enactment (1919), which forbade the teaching in schools of any language other than English. "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

*Schlessinger* v. *Wisconsin*, 270 U. S. 230, 240. "The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

*Near* v. *Minnesota*, 283 U. S. 697, overthrew a Minnesota statute designed to protect the public against obvious evils incident to the business of regularly publishing malicious, scandalous and defamatory matters, because of conflict with the XIV Amendment.

In the following, among many other cases, much consideration has been given to this subject. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522 and 267 U. S. 552; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Tyson & Brother* v. *Banton*, 273 U. S. 418; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1; *Ribnik* v. *McBride*, 277 U. S. 350; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Sterling* v. *Constantin*, 287 U. S. 378. All stand in opposition to the views apparently approved below.

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If validity of the enactment depends upon emergency, then to sustain this conviction we must be able to affirm that an adequate one has been shown by competent evidence of essential facts. The

asserted right is federal. Such rights may demand and often have received affirmation and protection here. They do not vanish simply because the power of the State is arrayed against them. Nor are they enjoyed in subjection to mere legislative findings. If she relied upon the existence of emergency, the burden was upon the State to establish it by competent evidence. None was presented at the trial. If necessary for appellant to show absence of the asserted conditions, the little grocer was helpless from the beginning—the practical difficulties were too great for the average man.

What circumstances give force to an "emergency" statute? In how much of the State must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? If three days after this act became effective another "very grievous murrain" had descended and half of the cattle had died, would the emergency then have ended, also the prescribed rates? If prices for agricultural products become high can consumers claim a crisis exists and demand that the Legislature fix less ones? Or are producers alone to be considered, consumers neglected? To these questions we have no answers. When emergency gives potency, its subsidence must disempower; but no test for its presence or absence has been offered. How is an accused to know when some new rule of conduct arrived, when it will disappear?

It is argued that the report of the Legislative Committee, dated April 10th, 1933, disclosed the essential facts. May one be convicted of crime upon such findings? Are federal rights subject to extinction by reports of committees? Heretofore, they have not been.

Apparently the Legislature acted upon this report. Some excerpts from it follow. We have no basis for determining whether the findings of the committee or legislature are correct or otherwise. The court below refrained from expressing any opinion in that regard, notwithstanding its declaration "that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and even then by reasonable regulation only and that legislative conclusions based on findings of fact are subject to judicial review." On the other hand it asserted—"This court should consider only the legitimacy of the conclusions drawn from the facts found."

In New York there are twelve million possible consumers of milk; 130,000 farms produce it. The average daily output approximates 9,500,000 quarts. For ten or fifteen years prior to 1929 or 1930 the per capita consumption steadily increased; so did the supply. "Realizing the marked improvement in milk quality, the public has tended to increase its consumption of this commodity." "In the past two years the per capita consumption has fallen off, [possibly] 10 per cent." "These marked changes in the trend of consumption of fluid milk and cream have occurred in spite of drastic reductions in retail prices. The obvious cause is the reduced buying power of consumers." "These cycles of overproduction and underproduction which average about 15 years in length, are explained by the human tendency to raise too many heifers when prices of cows are high and too few when prices of cows are low. A period of favorable prices for milk leads to the raising of more than the usual number of heifers, but it is not until seven or eight years later that the trend is reversed as a result of the falling prices of milk and cows." "Farmers all over the world raise too many heifers whenever cows pay and raise too few heifers when cows do not pay."

"During the years 1925 to 1930 inclusive, the prices which the farmers of the state received for milk were favorable as compared with the wholesale prices of all commodities. They were even more favorable as compared with the prices received for other farm products, for not only in New York but throughout the United States the general level of prices of farm products has been below that of other prices since the World War."

"The comparatively favorable situation enjoyed by the milk producers had an abrupt ending in 1932. Even before that, in 1930 and 1931, milk prices dropped very rapidly." "The prices which farmers received for milk during 1932 were much below the costs of production. After other costs were paid the producers had practically nothing left for their labor. The price received for milk in January, 1933, was little more than half the cost of production."

"Since 1927 the number of dairy cows in the state has increased about 10 per cent. The effect of this has been to increase the surplus of milk." "Similar increases in the number of cows have occurred generally in the United States and are due to the periodic changes in number of heifer calves raised on the farms. Previous

experience indicates that unless some form of arbitrary regulation is applied, the production of milk will not be satisfactorily adjusted to the demand for a period of several years." "Close adjustment of the supply of fluid milk to the demand is further hindered by the periodic changes in the number of heifers raised for dairy cows."

"The purpose of this emergency measure is to bring partial relief to dairymen from the disastrously low prices for milk which have prevailed in recent months. It is recognized that the dairy industry of the state cannot be placed upon a profitable basis without a decided rise in the general level of commodity prices."

Thus we are told the number of dairy cows had been increasing and that favorable prices for milk bring more cows. For two years notwithstanding low prices the per capita consumption had been falling. "The obivous cause is the reduced buying power of consumers." Notwithstanding the low prices, farmers continued to produce a large surplus of wholesome milk for which there was no market. They had yielded to "the human tendency to raise too many heifers" when prices were high and "not until seven or eight years" after 1930 could one reasonably expect a reverse trend. This failure of demand had nothing to do with the quality of the milk—that was excellent. Consumers lacked funds with which to buy. In consequence the farmers became impoverished and their lands depreciated in value. Naturally they became discontented.

The exigency is of the kind which inevitably arises when one set of men continue to produce more than all others can buy. The distressing result to the producer followed his ill-advised but voluntary efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the Legislature to fix sales prices, then whenever there is too much or too little of an essential thing—whether of milk or grain or pork or coal or shoes or clothes—constitutional provisions may be declared inoperative and the "anarchy and despotism" prefigured in *Milligan's* case are at the door. The futility of such legislation in the circumstances is pointed out below.

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*Block* v. *Hirsh*, 256 U. S. 135 and *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170 are much relied on to support emergency legislation. They were civil proceedings; the first to recover a

leased building in the District of Columbia; the second to gain possession of an apartment house in New York. The unusual conditions grew out of the World War. The questioned statutes made careful provision for protection of owners. These cases were analyzed and their inapplicability to circumstances like the ones before us was pointed out in *Tyson* v. *Banton*, 273 U. S. 418. They involved peculiar facts and must be strictly limited. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416, said of them—"The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act."

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Is the milk business so affected with public interest that the Legislature may prescribe prices for sales by stores? This Court has approved the contrary view; has emphatically declared that a State lacks power to fix prices in similar private businesses. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Adkins* v. *Children's Hospital*, 261 U. S. 525; *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522; *Tyson & Brother* v. *Banton*, 273 U. S. 418; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1; *Ribnik* v. *McBride*, 277 U. S. 350; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *Sterling* v. *Constantin*, 287 U. S. 378, 396.

*Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 537.—Here the State statute undertook to destroy the freedom to contract by parties engaged in so-called "essential" industries. This Court held that she had no such power. "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. . . . An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes." On a second appeal, 267 U. S. 552, 569, the same doctrine was restated:—"The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It

will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment. 'The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.' "

*Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 9.—A statute commanded buyers of cream to adhere to uniform prices fixed by a single transaction.—"May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

*Williams* v. *Standard Oil Co.*, 278 U. S. 235, 239.—The State of Tennessee was declared without power to prescribe prices at which gasoline might be sold. "It is settled by recent decisions of this Court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' " Considered affirmatively, "it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

*New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 277.—Here Oklahoma undertook the control of the business of manufacturing and selling ice. We denied the power so to do. "It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, . . . . And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use."

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Regulation to prevent recognized evils in business has long been upheld as permissible legislative action. But fixation of the price at which "A", engaged in an ordinary business, may sell, in order to enable "B", a producer, to improve his condition, has not been regarded as within legislative power. This is not regulation, but management, control, dictation—it amounts to the deprivation of the fundamental right which one has to conduct his own affairs honestly and along customary lines. The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some legislature finds and declares such action advisable and for the public good. This Court has declared that a State may not by legislative fiat convert a private business into a public utility. *Michigan Comn.* v. *Duke*, 266 U. S. 570, 577. *Frost Trucking Co.* v. *R. R. Comn.*, 271 U. S. 583, 592. *Smith* v. *Cahoon*, 283 U. S. 553, 563. And if it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution.

*Munn* v. *Illinois* (1877), 94 U. S. 113, has been much discussed in the opinions referred to above. And always the conclusion was that nothing there sustains the notion that the ordinary business of dealing in commodities is charged with a public interest and subject to legislative control. The contrary has been distinctly announced. To undertake now to attribute a repudiated implication to that opinion is to affirm that it means what this Court has declared again and again was not intended. The painstaking effort there to point out that certain businesses like ferries, mills,

&c. were subject to legislative control at common law and then to show that warehousing at Chicago occupied like relation to the public would have been pointless if "affected with a public interest" only means that the public has serious concern about the perpetuity and success of the undertaking. That is true of almost all ordinary business affairs. Nothing in the opinion lends support, directly or otherwise, to the notion that in times of peace a legislature may fix the price of ordinary commodities—grain, meat, milk, cotton, &c.

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Of the assailed statute the Court of Appeals says—"It first declares that milk has been selling too cheaply in the State of New York, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote of three officials." Also—"With the wisdom of the legislation we have naught to do. It may be vain to hope by laws to oppose the general course of trade." Maybe, because of this conclusion, it said nothing concerning the possibility of obtaining increase of prices to producers—the thing definitely aimed at—through the means adopted.

But plainly, I think, this Court must have regard to the wisdom of the enactment. At least, we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power—whether the end is legitimate, and the means appropriate. If a statute to prevent conflagrations, should require householders to pour oil on their roofs as a means of curbing the spread of fire when discovered in the neighborhood, we could hardly uphold it. Here, we find direct interference with guaranteed rights defended upon the ground that the purpose was to promote the public welfare by increasing milk prices at the farm. Unless we can affirm that the end proposed is proper and the means adopted have reasonable relation to it, this action is unjustifiable.

The court below has not definitely affirmed this necessary relation; it has not attempted to indicate how higher charges at stores to impoverished customers when the output is excessive and sale prices by producers are unrestrained, can possibly increase receipts at the farm. The Legislative Committee pointed out as the obvious cause of decreased consumption, notwithstanding low prices, the

consumers' reduced buying power. Higher store prices will not enlarge this power; nor will they decrease production. Low prices will bring less cows only after several years. The prime causes of the difficulties will remain. Nothing indicates early decreased output. Demand at low prices being wholly insufficient, the proposed plan is to raise and fix higher minimum prices at stores and thereby aid the producer whose output and prices remain unrestrained! It is not true as stated that "the State seeks to protect the producer by fixing a minimum price for his milk." She carefully refrained from doing this; but did undertake to fix the price after the milk had passed to other owners. Assuming that the views and facts reported by the Legislative Committee are correct, it appears to me wholly unreasonable to expect this legislation to accomplish the proposed end—increase of prices at the farm. We deal only with Order No. 5 as did the court below. It is not merely unwise; it is arbitrary and unduly oppressive. Better prices may follow but it is beyond reason to expect them as the consequent of that order. The Legislative Committee reported—"It is recognized that the dairy industry of the State cannot be placed upon a profitable basis without a decided rise in the general level of commodity prices."

Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to standards long accepted—complete destruction may follow; but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. To him with less than nine cents it says—You cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters! And this is true although the storekeeper himself may have bought from a willing producer at half that rate and must sell quickly or lose his stock through deterioration. The fanciful scheme is to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold!

The statement by the court below that—"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract . . .;

with the natural law of supply and demand", is obviously correct. But another, that "statutes aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view", conflicts with views of Constitutional rights accepted since the beginning. An end although apparently desirable cannot justify inhibited means. Moreover the challenged act was not designed to stimulate production—there was too much milk for the demand and no prospect of less for several years; also "standards of prices" at which the producer might sell were not prescribed. The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public. And the adoption of any "concept of jurisprudence" which permits facile disregard of the Constitution as long interpreted and respected will inevitably lead to its destruction. Then, all rights will be subject to the caprice of the hour; government by stable laws will pass.

The somewhat misty suggestion below that condemnation of the challenged legislation would amount to holding "that the due process clause has left milk producers unprotected from oppression", I assume, was not intended as a material contribution to the discussion upon the merits of the cause. Grave concern for embarrassed farmers is everywhere; but this should neither obscure the rights of others nor obstruct judicial appraisement of measures proposed for relief. The ultimate welfare of the producer, like that of every other class, requires dominance of the Constitution. And zealously to uphold this in all its parts is the highest duty intrusted to the courts.

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The judgment of the court below should be reversed.

Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER authorize me to say that they concur in this opinion.